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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

Zambia is one of the poorest countries in the world. It is estimated that 68% of the population live below the poverty line¹. It is ranked number 165 out of 177 in the United Nations Development Programme human development index.² The average life expectancy is 37.7 years³. Nicholas Haysom states that:

...within the narrow world of political/civil rights there is a recognition that citizens need more than access to the ballot box to be empowered to act as citizens. The constitution cannot be allowed to sanction second or third class citizenship. It is for this same reason that certain socio-economic rights need to be treated as fundamental rights. Can an illiterate, hungry person participate in the political process let alone social life? Does a marginalised, rural woman – untrained and unemployed – have anything remotely akin to civic equality to her urban middle-class male compatriot? The question barely needs an answer.⁴

Over the four decades of Zambia's independence there have been four different constitutions. The current Constitution was the first to introduce socio-economic rights into the main body of the Constitution, but only as non-justiciable directive principles of state policy. Since their introduction ten years ago, there has been no jurisprudence relating to these rights. They are simply not seen as rights that can be claimed and enforced. Currently, Zambians have no right to claim food, water, housing, education, health and other basic necessities of life. It is for this reason that socio-economic rights need to be treated as fundamental rights. This chapter begins by stating the aim of the paper then gives a brief historical background of the Zambian Constitution and the status of socio-economic rights. It then goes into the significance of the study and concludes with the chapter outline.

¹ Central Statistical Office (Zambia) at www.zamstats.gov.zm/ [accessed 29/01/07].

² United Nations Development Programme human development index at http://hdr.undp.org/hdr.2006/statistics/countries/country_fact_sheets/cty_fs_ZMB.html [accessed on 22/03/2007].

³ Ibid.

⁴ Nicholas Haysom, 'Constitutionalism, majoritarian democracy and socio-economic rights', (1992) 8 *S. Afr. J. Hum. Rts* at p 451(now referred to as "Haysom") at p 460.

1.2 AIMS OF STUDY

With the majority of the population languishing in poverty it is evident that the socio-economic rights of the people of Zambia are not being fulfilled. Following the recommendations of the Mung'omba Commission, this study examines the need for justiciable socio-economic rights in the Bill of Rights of the Zambian Constitution. The nature of the rights and various ways of implementing them will be reviewed. There will also be discussion as to how best the justiciable socio-economic rights can be effectively implemented and enforced. In this paper "justiciable" means "the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognised obligation to respect, protect or fulfil a person's right".⁵ When writing about the inclusion of justiciable socio-economic rights in a constitution, many writers have concluded that they have no place in any constitution because of their nature and because, they claim, enforcing them infringes on the principle of separation of powers. During the course of the paper I will address these arguments and look at the arguments for adopting justiciable socio-economic rights and the need for them to be enshrined in the Zambian Bill of Rights.

1.3 HISTORICAL BACKGROUND TO THE ZAMBIAN CONSTITUTION AND THE STATUS OF SOCIO-ECONOMIC RIGHTS

1.3.1 The pre-independence Constitution

Pre-colonialism the many tribes that now make up the Zambian people lived communally in villages headed by chiefs.⁶ Without recognising them as socio-economic rights the people shared their food, looked after the sick and elderly, and took care of each other's children. These units remained intact to some extent after the advent of colonialism but with it came forced labour, which for many men meant moving away from the villages, and the idea of being taxed by the colonialists.⁷ By 1900 British rule of different parts of what is now called Zambia was made official by

⁵ Craig Scott and Patrick Macklem, 'Constitutional ropes of sand or justiciable guarantees? social rights in a new South African constitution', (November 1992), 141 *U. Pa. L. Rev.* 1 (now referred to as "Scott and Macklem" at [*17]).

⁶ Osita C. Eze, 'Human rights and social justice: an African perspective', Annual Lecture Series No. 4, Empowerment and Action Research Centre at p 24 – 30.

⁷ For a discussion on African colonial history see Osita C. Eze *supra*.

two orders: the North-Western Rhodesia-Barotseland Order-in-Council of 1899 and the North-Eastern Rhodesia Order in Council of 1900.⁸ In 1911 the territories were merged into what became known as Northern Rhodesia.⁹ Barotseland was granted special status as a British Protectorate after agreeing to let the British South Africa Company (BSAC) have sole control over its trading and mining rights.¹⁰ Rule by the BSAC ended on 1st February 1924 and colonial rule under a Governor was established by an Order-in-Council.¹¹ During colonial rule the territory did not have its own constitution, only that provided by Westminster.¹² There were several decrees by the British government referred to as “Constitutions” enacted through Orders-in-Council.¹³ They could be amended in response to particular needs.¹⁴ They aimed to promote governance by the white settlers and acquiescence by the Africans hence there were few socio-economic rights given to the native people. In 1953 the Central African Federation, made up of Northern Rhodesia, Southern Rhodesia and Nyasaland, was formed.¹⁵ The colonialists saw it as a way of imposing indirect rule through white settler control.¹⁶ Federalism only led to increased African nationalism and by 1963 the Federation had collapsed.¹⁷ Full suffrage arrived in January 1964 and in that year Kenneth David Kaunda was elected the last Prime Minister of Northern Rhodesia.¹⁸ Northern Rhodesia gained its independence on 24th October 1964 and was renamed Zambia.

1.3.2 The independence Constitution of 1964

Zambia was the first British colony to become a republic immediately upon gaining independence.¹⁹ Under the 1964 Constitution all legislative powers were vested in Parliament which was made up of the President and the National Assembly.²⁰ The

⁸ Muna Ndulo and Robert B. Kent, ‘Constitutionalism in Zambia: past, present and future’, (1996) Vol. 40, No. 2, *Journal of African Law*, Liber Amicorum for Professor James S. Read, p256-278 (now referred to as Ndulo and Kent) at p258.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Op cit at p259.

¹² Supra n.11.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ United States of America state department, ‘Constitution, government & legislation’, (now referred to as “US State Dept”) at <http://jurist.law.pitt.edu/world/zambia.htm> [accessed December 2007].

²⁰ Ndulo and Kent p261.

judiciary was made up of the High Court, with original and unlimited jurisdiction, and the Court of Appeal, the highest court, with appellate jurisdiction.²¹ The judiciary was relatively independent but occasionally suffered from political interference.²² The Bill of Rights in the 1964 Constitution was extensive and included the following rights: liberty, life, security of the person and the protection of law, freedom of conscience, expression and assembly and association, freedom for the privacy of the home and other property, and freedom from deprivation of property without compensation.²³ However, no socio-economic rights were included in the Constitution. The fundamental rights were granted without discrimination on the ground of race, place of origin, political opinions, colour, creed or sex.²⁴ They were qualified by detailed claw-back clauses which the government used to interfere with peoples' rights.²⁵ The provisions regarding non-discrimination in relation to race, sex and place of origin did not apply to customary law thus marginalising women in society. The rights in the Bill of Rights were justiciable and the courts handled many such cases. However, the judiciary was cautious in cases with political implications.²⁶ Cases concerning detention without trial under the state of emergency were restricted by the claw-back clauses. Despite this, judicial review was established as a principle which helped the protection of human rights in later years.²⁷ The 1964 Constitution introduced more stringent procedures for the amendment of the Constitution; to amend the Constitution a vote of at least two-thirds of the National Assembly was required.²⁸ To amend the fundamental rights under the Constitution a bill could not be enacted without approval by a national referendum.²⁹ In 1969 the provision requiring a national referendum to amend the fundamental rights was repealed by a constitutional amendment termed the "referendum to end all referenda".³⁰ It intended to make it easier to amend the provision relating to the right to property but had far-reaching consequences.³¹ The clause was an obstacle to government plans for wide-scale nationalisation of private

²¹ Op cit p262.

²² Supra n.21, discussed in chapter 4.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Op cit p 264.

²⁸ Supra.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

businesses.³² It eventually made it easier to adopt a one-party government system as the entire Constitution could be changed without the need for a national referendum.

1.3.3 The 1973 Constitution facilitating a one-party state

In 1973, following the report of a constitutional review commission headed by the then Vice-President Mainza Chona, the 1964 constitution was replaced by one creating a socialist, one-party state. That party was the United National Independence Party (UNIP) and its leader was Kenneth David Kaunda. The idea behind the formation of a one-party state was to unify the country which Kaunda feared was divided by political factionalism along tribal lines. The slogan “One Zambia, One Nation” was used liberally to symbolise the unified nation. Humanism, a poorly understood concept, was the philosophy behind the state as contained in the preamble of the Constitution³³. The concept of Humanism as noted in the preamble “declared the right of all men freely to determine and build their own political, economic and social system by ways and means of their own free choice”.³⁴ The Constitution itself recognised “the protection of life, liberty and property, freedom of conscience, expression and association *within the context of our National Constitution*”.³⁵

It is surprising that the humanist socialist government did not provide for socio-economic rights given its emphasis on human development. Instead, the rights that were provided were largely ineffective because of the wide powers of the executive. Freedom of speech and assembly could only be exercised within the ruling UNIP party.³⁶ The President had powers to detain people without trial;³⁷ political opponents became targets of these laws. The Constitution allowed for the use of the Emergency Powers Act and the Public Security Regulations when a state of emergency was declared in the country.³⁸ Zambia was under a state of emergency for most of the pre- and post-independence period.³⁹ The police were given sweeping powers during this time. When it came to elections the ruling party only presented one candidate to

³² Ibid.

³³ Op cit p 266.

³⁴ Supra n.33.

³⁵ Ibid citing The Constitution of Zambia Act 1973 Chapter 1 of the Laws of Zambia, emphasis added.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

which the electorate had to vote yes or no.⁴⁰ The State had a controlling interest in most of the local industries.

1.3.4 The 1991 Constitution

In December 1990, following a series of shortages of essential commodities and general dissatisfaction with the iron-fisted leadership of the country, civil unrest grew in the country culminating in riots in the capital and a coup attempt which, though unsuccessful, eventually led Kaunda to sign legislation ending one-party rule.⁴¹ The tide turned in favour of multi-party democracy and after negotiations with opposition parties a new constitution was enacted in August 1991.⁴² On 31st October 1991 elections were held and the opposition party the Movement for Multi-party Democracy (MMD) came into power in a landslide victory.⁴³

The new constitution increased the maximum number of National Assembly members from 136 to 158, established an electoral commission and allowed more than one presidential candidate to stand from any political party.⁴⁴ The reference to humanism in the preamble was removed.⁴⁵ Article 1 declared the Constitution the supreme law of the land and any law inconsistent with it was void to the extent of the inconsistency.⁴⁶ This strengthened the role of the judiciary. The protection of fundamental rights and freedoms of the individual were provided for but the limitations contained in the 1973 Constitution were maintained.⁴⁷ An example of this was the exclusion of the principle of non-discrimination in relation to customary law.⁴⁸ Freedom of movement was still subject to detention laws. However, the imposition of a state of emergency was made subject to the approval of Parliament.⁴⁹ The provision that a national referendum was required for an amendment to the fundamental rights and freedoms in Part III of the Constitution was re-introduced.⁵⁰

⁴⁰ Op cit p 267.

⁴¹ US State Dept.

⁴² US State Dept.

⁴³ Ndulo and Kent p 270.

⁴⁴ US State Dept.

⁴⁵ Ndulo and Kent p 269.

⁴⁶ Ibid.

⁴⁷ Op cit p 270.

⁴⁸ Supra n.47.

⁴⁹ Ibid.

⁵⁰ Ibid.

Socio-economic rights were included in the preamble as mere aspirations of the state⁵¹ and thus were not rights in the real sense of the word. The Constitution strengthened the principle of separation of powers and reduced executive powers.⁵² Following the return of multi-party democracy the economy was liberalised: privatisation and structural adjustment programmes became the order of the day.

1.3.5 The 1996 Constitution

In 1991 a Constitutional Review Commission headed by John Mwanakatwe was charged with reviewing the 1991 Constitution and the previously repealed Constitutions, two years after the existing Constitution had come into effect.⁵³ It had been formed to fulfil an election promise by the MMD to replace the 1991 Constitution with one that would be non-partisan and strengthen democracy and the protection of human rights.⁵⁴ Its terms of reference were broad:

[to] ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the re-emergence of a dictatorial form of government; ...appropriate arrangements for the entrenchment and protection of human rights, the rule of law and good governance;...the competence, impartiality and independence of the judiciary...⁵⁵

The Commission was also requested to recommend “whether the Constitution should be adopted by National Assembly or by a Constituent Assembly, by a National Referendum or by any other method; ...[and] a suitable method for amending any part of the Constitution”.⁵⁶ After extensive consultations with the people of Zambia the Commission made several recommendations including the following:⁵⁷

⁵¹ The Constitution of Zambia (1991) Chapter 1 of the Laws of Zambia.

⁵² Ndulo and Kent p 271.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Op cit p 272 referring to the Terms of reference of the Commission (1), (2), (3), (4) contained in statutory instrument No. 151 of 1993.

⁵⁶ Ibid citing term of reference (9).

⁵⁷ Op cit p 272-273.

- The Constitution should be adopted by Constituent Assembly consisting of a wide cross-section of society, being the most representative means of adoption;⁵⁸
- It included a list of “Directive Principles of State Policy” being aspirations of all branches of the government for administration, law-making and adjudication, these included socio-economic rights. The Commission insisted that these principles be non-justiciable⁵⁹ as it felt that the State did not have adequate resources to implement them⁶⁰;
- It recommended strengthening some human rights like freedom of the press; and adding others like residence, human dignity and reputation, culture, marriage, a clean environment and equal pay for equal work;⁶¹
- Academic and intellectual freedom were recommended for protection;⁶²
- Women’s rights were to be improved by the abolition of the discriminatory cultural and other practices;⁶³
- It included economic protection of women such as maternity leave, and an article on children’s rights was provided;⁶⁴
- It was suggested that the *locus standi* of those claiming fundamental rights be widened;⁶⁵
- It recommended that some of the claw-back clauses to the fundamental rights be removed;⁶⁶ and
- The Commission recommended the introduction of a Constitutional Court to adjudicate on constitutional matters;⁶⁷
- The Commission proposed the creation of a human rights commission to investigate human rights violations and promote human rights;⁶⁸

⁵⁸ Ibid referring to the Report of the Constitutional Review Commission 1995 (now referred to as the “Mwanakatwe Report”), Chapter 27, recommendation 27 and 27(1).

⁵⁹ Ibid referring to the Mwanakatwe Report Chapter 4 paragraphs 4.0-4.3.7.

⁶⁰ Report on the Constitutional Review Commission, December 2005 (now referred to as the “Mung’omba Report”) at p 192.

⁶¹ Ibid, referring to the Mwanakatwe Report Chapter 7, paragraph 7.2, 15.

⁶² Ibid, referring to the Mwanakatwe Report Chapter 7, paras 7.2.17 and 7.2.20, 18 and 19.

⁶³ Ibid, referring to the Mwanakatwe Report Chapter 7, para 7.2.21, 19.

⁶⁴ Ibid, referring to the Mwanakatwe Report Chapter 7, para 7.2.23, 19.

⁶⁵ Ibid, referring to the Mwanakatwe Report Chapter 7, para 7.6, 21.

⁶⁶ Op cit p 273.

⁶⁷ Ibid.

⁶⁸ Op cit p 274.

- It proposed the restriction of the declaration of a state of emergency to situations where there was the threat of invasion, rebellion or natural disaster.⁶⁹ The Commission recommended that these powers be kept in check by being subject to judicial review by a Constitutional Court.⁷⁰

At least 70% of the Mwanakatwe Commission's recommendations were rejected⁷¹ by the government. The government rejected the addition of many of the new individual rights, the creation of a Constitutional Court, the proposals for women's rights, and the proposals to create an independent Electoral Commission.⁷² However it did accept the recommendations concerning the creation of a human rights commission and the introduction of non-justiciable directive principles of state policy.⁷³ Significantly the government rejected proposals to adopt the constitutional amendments through a Constituent Assembly. The new Constitution came into being through the enactment of the Constitution of Zambia (Amendment) Act 1996 despite heavy criticism from civil society.⁷⁴ The entire 1991 Constitution was repealed apart from Part III containing the Fundamental Rights and Freedoms of the Individual which amendment required a national referendum. The 1996 Constitution remains in place.

1.3.5.1 Principles of the Current Zambian Constitution

Under Article 1(3) of the Zambian Constitution the Constitution is the supreme law of the land and any other law that is inconsistent with it is void to the extent of the inconsistency.⁷⁵ The Constitution makes no mention of the status of international law in Zambia.⁷⁶ But Zambia uses a dualist system meaning that the international treaties it ratifies must be domesticated by an act of Parliament before they can become law.⁷⁷ Although not specifically contained in the Constitution Zambia adheres to the principle of separation of powers. Zambia follows the Bangalore Principles which

⁶⁹ Ibid.

⁷⁰ Ibid referring to the Mwanakatwe Report Chapter 10, paras 10.0-10.10.

⁷¹ Alfred W. Chanda, 'The challenge of making a durable constitution in Zambia', a paper presented to the Law Association of Zambia Annual General Meeting between 25th and 26th April 2003 (now referred to as "Alfred W. Chanda") at p 5.

⁷² Ndulo and Kent p 274.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Article 1(3) of the Constitution of Zambia (1996) Chapter 1, Volume 1 of the Laws of Zambia.

⁷⁶ Professor Alfred W Chanda, 'Zambia' in Christof Heyns (ed), Vol. 2 *Human rights in Africa*, Martinus Nijhoff Publishers, Leiden/Boston 2004 at p 1685.

⁷⁷ Ibid.

require that national courts interpret national legislation in a way that is not inconsistent with international human rights treaties to which it is party.⁷⁸

1.3.6 The current constitutional review: The Mung'omba Commission

The Mung'omba Constitutional Review Commission was formed in 2003 against the background of severe criticism over previous Constitution's rejection of the majority of the peoples' submissions.⁷⁹ Although not as popular a cause as the adoption of the Constitution by a Constituent Assembly, the Commission did receive considerable number of submissions in favour of enshrining justiciable socio-economic rights in the Bill of Rights. This cause has particularly been championed by the Church.⁸⁰ The Mung'omba Commission has recommended that socio-economic rights should be enshrined in the Bill of Rights as justiciable rights.⁸¹ It also stated that the State should take reasonable legislative and other measures to realise these rights progressively within available resources.⁸² Contrary to the view of the two previous constitutional review commissions, the Mung'omba Commission found that financial constraints were not an excuse for depriving the Zambian people of socio-economic rights.⁸³ The Commission recognised that civil and political rights and socio-economic rights were indivisible and interdependent stating for example that freedom of expression could not be adequately exercised without the right to education.⁸⁴ It observed that people often consider socio-economic rights as costly but stated that the protection of any right has a cost which any country should be prepared to spend money to guarantee its citizens socio-economic rights.⁸⁵ They also recommended the establishment of a constitutional court to decide on constitutional matters⁸⁶ and the adoption of the Constitution by a Constituent Assembly. Civil society is largely in favour of the Mung'omba Commission's recommendations. The official government response to the Mung'omba Report has yet to be released. This study seeks to support

⁷⁸ Ibid.

⁷⁹ Mung'omba Report at p 68.

⁸⁰ See Simson Mwale, 'Can we afford economic, social and cultural rights in the constitution?', A paper presented at the Alliance Francaise on 20th April 2006 for the Jesuit Centre for Theological Reflection available at www.jctr.org.zm [accessed December 2006].

⁸¹ Mung'omba Report at p195.

⁸² Ibid p196.

⁸³ Mung'omba Report at p 193.

⁸⁴ Op cit at p 192.

⁸⁵ Op cit p 193.

⁸⁶ Op cit at p 203 and 204.

the Commission's recommendations for the need for justiciable socio-economic rights in the Zambian Constitution

1.4 CONCLUSION AND CHAPTER OUTLINE

The majority of Zambians do not have access to basic necessities of life and have no voice to raise their concerns about their quality of life. As this Chapter has demonstrated, socio-economic rights have been given scant protection in various Constitutions adopted in Zambia to date. These rights hold the key to facilitating access to basic services by poor people, empowering them and restoring their dignity. The aim of the paper is therefore to consider the need for justiciable socio-economic rights in the Zambian context. Chapter 2 surveys a range of the arguments commonly advanced against introducing justiciable socio-economic rights in the Bill of Rights. It is argued that these arguments are ill-conceived and constitute a misunderstanding of the nature of rights and the role of the judiciary in a constitutional democracy. A case for protecting these rights as justiciable rights is presented. Chapter 3 looks at various ways in which socio-economic rights have been given domestic application in different countries and argues that the best approach is to enshrine them in a Bill of Rights. Chapter 4 considers the specific circumstances in Zambia and demonstrates why a justiciable set of socio-economic rights should be included in the Zambian Bill of Rights. Chapter 5 concludes the discussion and makes some final recommendations.

CHAPTER 2: ARGUMENTS FOR AND AGAINST INCLUDING SOCIO-ECONOMIC RIGHTS IN A JUSTICIABLE BILL OF RIGHTS

2.1 INTRODUCTION

Historically, the Bill of Rights in constitutions worldwide have, with few exceptions, only included what are known as negative, as opposed to positive, rights. A positive right “is a claim to something [from the state]...while a negative right is a right that something not be done to one”⁸⁷ by the state. Socio-economic rights are seen as positive rights as they require positive action. Many reasons have been advanced against protecting socio-economic rights full rights on a par with civil and political rights. The resistance to socio-economic rights is not new. Controversy arose soon after adopting the Universal Declaration of Human Rights (UDHR),⁸⁸ as steps to translate the UDHR into binding treaty obligations were being taken after 1948. States were sharply divided over whether the rights should be afforded equal status.⁸⁹ The result was the adoption of two separate instruments, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).⁹⁰ This marked a triumph for opponents of socio-economic rights as these rights were given weaker enforcement mechanisms in the ICESCR than their counterparts in the ICCPR.

Zambia has been greatly influenced by this negativity to socio-economic rights. All previous constitutional review commissions argued against the incorporation of these rights in the Bill of Rights. It is only the Mung’omba Commission that has displayed a positive attitude to these rights. Unfortunately, the Mung’omba Commission did not provide detailed reasons for its conclusion. It is therefore critical that the arguments often made against the inclusion of socio-economic rights in the Constitution as justiciable rights be investigated, analysed and critiqued.

⁸⁷ Frank B. Cross, ‘The error of positive rights’, 48 *UCLA L. Rev.* 857 (hereinafter referred to as “Cross”) at n.21

⁸⁸ Asbjorn Eide et al (eds.), *Economic Social and Cultural Rights*, 1995, Martinus Nijhoff Publishers The Netherlands at p15

⁸⁹ Ibid.

⁹⁰ Ibid

2.2 ARGUMENTS FOR AND AGAINST SOCIO-ECONOMIC RIGHTS

All of the objections to the implementation of socio-economic rights relate to either their very nature or the argument that implementing them would breach the doctrine of separation of powers adhered to in most jurisdictions, including Zambia. They are discussed in detail below.

2.2.1 The Bill of Rights should only contain negative rights.

This argument is based on the idea that a Bill of Rights should only prevent the state from interfering in an individual's actions. Positive rights on the other hand, require positive action to be taken by the government and is therefore an expensive undertaking. First of all, I would argue that not all negative rights protected in a Bill of rights are purely negative in nature. For instance the right to a fair trial, a "negative" right, requires the government to create and maintain a judiciary, provide courts, interpreters, and even legal counsel for the indigent. All these come at a cost. The case of *Airey v Ireland*⁹¹ illustrates this point. The court in that case held that the right to a fair trial extended to the right to legal aid funding. The counter-argument to this proposition is that government will only be made to spend resources on issues that it should have been spending them on in the first place. As the Mung'omba Report put it:

Protection of any right has a cost, and the country should be prepared to spend resources in order to guarantee its citizens a minimum of economic, social and cultural rights. The fact that a country is poor does not constitute a legitimate excuse for it to avoid striving to ensure that its citizens enjoy economic, social and cultural rights such as the right to adequate food, education and health care.⁹²

The court's decision need not always involve resource allocation. It can merely point out the violation and instruct the relevant authority to remedy it in the most appropriate way.⁹³ In the case of *Cruz del Valle Bermudez v Ministry of Health and Social Action*,⁹⁴ the Venezuelan Supreme Court considered whether people living

⁹¹ Eur. H. R. Rep. 305, 315 (1979). It will be discussed in more detail in the next chapter.

⁹² Mung'omba Report at p 193.

⁹³ Ellen Wiles, 'Aspirational principles or enforceable rights? The future for socio-economic rights in national law', 2006 22 *Am. U. Int'l L. Rev.* 35 (now referred to as "Wiles") at [*47].

⁹⁴ Supreme Court of Justice of Venezuela, Case No. 15.789, Decision No. 916 (1999).

with HIV/AIDS had the right to free life-saving medication.⁹⁵ The court found that at the heart of the right to health was a positive duty to prevent illness and ordered the Ministry of Health to conduct a study into the minimum requirements of people with HIV/AIDS and to present it for consideration at the next budget.⁹⁶ Amartya Sen acknowledges that there is a theoretical distinction between positive and negative rights but asks: “Why is it important that I should not be stopped from doing something and unimportant whether or not I can in fact do that thing?”⁹⁷ As the Mung’omba report points out, positive and negative rights are interdependent and indivisible.⁹⁸ In order to fulfil a person’s dignity both positive and negative rights must be given equal protection. All rights have positive and negative dimensions such as the right to a fair trial and subsequently socio-economic rights should not be given less prominence than civil and political rights.

2.2.2 Socio-economic rights are imprecise

The argument is that socio-economic rights are conceptually imprecise, for example what does the right to health include? Scott and Macklem argue that they are much more precise than people think.⁹⁹ They argue that in fact non-entrenchment of the rights has led to the imprecision as courts have not accumulated a body of experience in the area.¹⁰⁰ In any case even civil and political rights are not that precise, for example, the right to life includes questions as to whether abortion or the death penalty should be permissible. The Committee on Economic Social and Cultural Rights has adopted 18 general comments interpreting various socio-economic rights and the obligations of states. These general comments have helped to provide insight into the meaning of these rights. Jurisprudence on these rights has also started to emerge. For example, the Constitutional Court of South Africa has handed down a number of important decisions defining socio-economic rights and the obligations they give rise to.¹⁰¹ Likewise, the African Commission on Human and Peoples Rights

⁹⁵ Wiles at [*47].

⁹⁶ Ibid.

⁹⁷ Cross at [*875].

⁹⁸ Mung’omba Report at p 192.

⁹⁹ Scott and Macklem [*84].

¹⁰⁰ Op cit at [*73].

¹⁰¹ *The Government of the Republic of South Africa v Grootboom and Others* 2000 BCLR 1169 (now referred to as *Grootboom* and *Minister of Health v Treatment Action Campaign* (1) 2002 (10) BCLR 1033 (CC) (now referred to as the “*Treatment Action Campaign* case”). In both cases the Court

has delivered two important decisions concerning these rights.¹⁰² These decisions clearly establish that both negative and positive obligations of states in relation to socio-economic rights can be enforced through courts.

2.2.3 Socio-economic Rights are not capable of immediate implementation.

The concept of “progressive realisation” of socio-economic rights stems from the practical fact that it is not always possible to give immediate effect to them because they require the allocation of resources. Thus some of these rights must be realised over time. Some observers see this as a problem as they argue that a right should be capable of immediate enforcement. It must be observed that this problem also exists with respect to some civil and political rights such as the right to a fair trial. However, the Committee on Economic Social and Cultural Rights acknowledges that the implementation of socio-economic rights under the ICESCR differs from that under the ICCPR which requires an immediate duty to respect and ensure all the rights contained therein.¹⁰³ According to the Committee progressive realisation does not mean that states should postpone their obligations. Rather, Article 2(1) of the ICESCR places an obligation on states to take steps “with a view to achieving progressively the full realisation of the rights recognised”.¹⁰⁴ The Covenant also obliges states to “move as expeditiously and effectively as possible towards that goal” without taking deliberately retrogressive measures.¹⁰⁵ The Limburg Principles state that “[t]he obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available”. This interpretation of progressive realisation was also adopted by the South African Constitutional Court in *Grootboom*.¹⁰⁶ Despite the fact that the South African Constitution adopts the language of progressive realisation in some of its socio-economic rights provisions, this case established that courts may enforce positive obligations implicit in such

employed the notion of reasonableness to assess the positive obligations of states. Both cases are discussed in chapter 3.

¹⁰² *The Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v Nigeria* Communication 155/96 ACHPR/COMM/A044/1 (27 May 2002) and *Puhorit and Moore v The Gambia* Communication 241/2001, unpublished (now referred to as the “Puhorit case”). This case is discussed on p. 20.

¹⁰³ General Comment 3, The nature of States parties obligations (Art. 2 para.1 of the Covenant) (Fifth session 1990), Compilation of general comments and general recommendations adopted by human rights treaty bodies, U.N. Doc. HRI/GEN/Rev. 1 at 45 1994 (hereinafter referred to as “General Comment 3”) at para. 9.

¹⁰⁴ *Ibid* at para 9.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Government of the RSA v Grootboom & Others* 2000 (11) BCLR 1169 at para [45].

rights through the benchmark of reasonableness. Significantly, notwithstanding the fact that these rights are supposed to be realised progressively, they also generate negative obligations and can thus be used to stop the state from interfering with current access to these rights. Thus, for example, in the *Purohit* case¹⁰⁷ the applicants alleged that the Gambia had violated various rights under the African Charter including the right to health. They claimed that the Lunatic Detention Act provided inadequate protection of the rights of mental patients. They argued that there were no safeguards for people during the diagnosis, certification and detention as mental patients; the psychiatric unit where mental patients were detained was overcrowded and had poor living conditions; and consent was not obtained from the patients before treatment was given. The African Commission found that Gambia had violated several rights under the Charter, including the right to health. They also considered the fact that poverty in Africa prevented millions from fully enjoying the right to health. Subsequently, the Commission interpreted Article 16 on the right to health as obliging states to “take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind”.¹⁰⁸

Progressive realisation is not the ideal situation, ideally all rights should be given immediate effect, however, one must recognise the restraints and limitations of the state. When it comes to progressive realisation certainly the deprived masses would rather have half a loaf than none. However, the situation can be managed by the judiciary putting time limits for implementation and setting up commissions to monitor progress¹⁰⁹ as the Supreme Court in India has done¹¹⁰.

2.2.4 The enforcement of positive rights forces the government to interfere with free markets

This argument is advanced in relation to countries such as Zambia that have free market economies. The idea behind the argument is that a constitution that restrains

¹⁰⁷ Communication 241/2001, unpublished, discussed by Danwood Mzikenge Chirwa in ‘African regional human rights system. The promise of recent jurisprudence on social rights’ in Malcolm Langford (ed.) *Socio-economic rights jurisprudence: emerging trends in comparative and international law* (2007).

¹⁰⁸ Ibid

¹⁰⁹ Wiles at [*56].

¹¹⁰ See Chapter 3 para 3.2.1.2..

the operation of free labour markets is counter-productive.¹¹¹ Sunstein uses the example of the Hungarian Constitution which protects the right to equal pay for equal work and the right to an income in conformity with the quantity and quality of work. He states that the provision will have one of two consequences: 1) either the courts will have to monitor labour markets closely or 2) the rights will be treated as aspirations rather than legally enforceable rights.¹¹² He admits that although the Hungarian example is an extreme case scenario, similar problems could arise regarding other rights such as rights to specified maximum working hours or paid parental leave¹¹³. He thus argues that these rights have no place in a constitution but should be placed in ordinary legislation.¹¹⁴ The first scenario painted by Sunstein sounds akin to some sort of pervasive Big Brother operation by the courts. This argument ignores the fact that even negative rights such as the right to freedom of expression are subject to restrictions. Similarly, the freedom to have free markets must also be subject to some sort of checks to ensure that workers rights are not trampled upon. In the same way that civil and political rights like freedom of speech are restricted, such as the right not to be defamed, free markets must also be checked for abuses for example against workers rights. The second scenario is a possibility but seems less likely where these rights are enshrined in the Bill of Rights as there is that added recognition and therefore legitimacy by the judiciary and the government.

2.2.5 The Judiciary is not competent to adjudicate over matters that affect government policy

Cass Sunstein argues that “Courts lack the tools of a bureaucracy. They cannot create government programs. They do not have systematic overview of government policy. It is, therefore, unrealistic to expect courts to enforce many positive rights”.¹¹⁵ This argument is addressed by the Committee on Economic, Social and Cultural Rights who state as follows:

¹¹¹ Cass R. Sunstein, ‘Against Positive Rights’, 2/1 East Eur. Constitutional Rev. 35 (1993) cited in Steiner and Alston, *International human rights in context, law, politics morals*, Oxford University Press (2000) at p281.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Cross at [*891] at n 184.

While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.¹¹⁶

In other words, one should not unnecessarily narrow the judiciary's terms of reference with relation to socio-economic rights, especially as the judiciary have proved to be quite capable of handling complex issues. For example, in the Canadian case of *Finlay v. Minister of Finance of Canada*, the court decided that the state cannot deduct amounts it may have erroneously overpaid people in welfare benefits as that would bring them below the level of minimum need.¹¹⁷

Related to the issue of judicial competence is the argument that giving the judiciary powers to adjudicate over socio-economic rights contravenes the principle of separation of powers. Some writers have stated that the judiciary should not be allowed to make decisions that affect government policy because the judiciary would be intruding in policy matters that are the preserve of other branches government. The kind of adjudication the author is advocating does not involve creating policy but merely quashing policies or legislation that violate socio-economic rights, a form of judicial review.¹¹⁸ This way the judiciary gets to keep the government in check but allows it to find its own means of remedying the right violated in the manner that the South African and Indian cases have proceeded. The idea of judicial review does not negate the idea of supervision by the courts which can be an important means of ensuring state compliance. All the arguments against making socio-economic rights justiciable are essentially based on the claim that the judiciary is not best placed to adjudicate over such matters. According to McMillan:

¹¹⁶ Committee on Economic, Social and Cultural Rights, 'The domestic application of the [International] Covenant [on Economic, Social and Cultural Rights]' General Comment No 9, UN Doc E/C. 12 /1998/24, December 1998 (here after referred to as General Comment 9) at paras 9 & 10

¹¹⁷ Wiles at [*54].

¹¹⁸ Etienne Mureinik, 'Beyond a charter of luxuries: economic rights in the constitution', (1992) 8 *S Afr J Hum Rts* p. 464 (hereafter referred to as "Mureinik" at p472.

The essence of the judicial function in public law cases is three-fold: judges can impartially and skilfully interpret legislative rules; by doing so independently of the other arms of government they can bolster community confidence in the administration of the law; and they can check the misuse of authority by other arms of government.¹¹⁹

This is true of adjudication of socio-economic rights which involves checks and balances on government policy. The South African Constitutional Court had this to say on the issue of separation of powers:

It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a Court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A Court may require the provision of legal aid, or the extension of state benefits to a class of people who formally were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that results in a breach of the separation of powers.¹²⁰

Clearly the South African Courts themselves do not see the task as insurmountable. Indeed the principle of separation of powers is never absolute.¹²¹ As a flexible concept it allows for deviations in order for checks and balances to be effective. In the South African case there has been no breach of the doctrine of separation of powers as the courts are merely exercising powers conferred on them by the Constitution.

Mureinik observes that the “real difficulty in the way of enforcing economic rights is not that they entail expenditure, nor that they call for a decision about how much to spend, but that they call for a decision about how to spend”.¹²² Related to this idea is the argument that socio-economic rights are polycentric¹²³ and subsequently “[n]o one has the right to something whose realisation requires certain uses of things and

¹¹⁹ J McMillan ‘Judicial restraint and activism in administrative law’, (2002) 30 Federal LR 335 cited in Pieterse at p 386.

¹²⁰ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), at paras 76-78.

¹²¹ Pieterse at p. 386.

¹²² Mureinik, at p. 466.

¹²³ Polycentric rights are rights which if implemented have resource implications for other competing rights see DM Davis, ‘The case against the inclusion of socio-economic demands in a bill of rights except as directive principles’, (1992) 8 *S. Afr J Hum Rts* 475 at p 477.

activities that other people have rights and entitlements over”.¹²⁴ These arguments are countered by van Bueren who says that there are many approaches to implementing socio-economic rights. This, she argues, should not be a hindrance to the adoption of justiciable socio-economic rights as the courts appear able to deal with the complex choices they have to make in cases involving civil and political rights such as balancing the right to privacy against the right to freedom of expression.¹²⁵ Indeed this has been affirmed by the South African Constitutional Court.¹²⁶ Just because there are many ways of solving a problem it does not make the solution chosen illegitimate. Pieterse states that provided that courts are presented with adequate evidence there is little they cannot do with regard to socio-economic rights.¹²⁷ Also socio-economic rights rely just as much as civil political rights on the will of the state to respect the court’s ruling.

2.2.6 Access to courts

Cross argues that litigants are needed in order for rights to be enforced.¹²⁸ More often than not potential litigants are poor with little or no resources to access the courts and employ qualified and competent counsel. This, he argues, means that wealthier litigants have an advantage over their poorer counterparts because they can afford better representation. These difficulties would greatly be reduced if the courts’ requirements for the standing of litigants were relaxed.¹²⁹ The courts might also be more accessible if the state improved the legal aid system if it had adequate resources to do so. In India the court’s concept of social action litigation has greatly increased accessibility to the courts. The Indian Supreme Court has given standing to petitioners who did not have a real interest in the case, in the sense of something like property, but had suffered a “wrong against a community interest”.¹³⁰ Petitioning procedures have also been relaxed; in one case a judge converted a letter in a newspaper into a

¹²⁴ Ibid citing Robert Nozick, *Anarchy, State & Utopia* (1974) 238.

¹²⁵ Geraldine van Bueren, “Alleviating poverty through the constitutional court”, (1999) 15 *S Afr J Hum Rts* at p61.

¹²⁶ See n.120 supra.

¹²⁷ Marius Pieterse, ‘Coming to terms with judicial enforcement of socio-economic rights’, (2004) 20 *SAJHR* p 383 (now referred to as “Pieterse”) at p 395.

¹²⁸ Cross at [*880].

¹²⁹ These suggestion are made by Scott and Macklem from [*140] to [*144] and will be discussed later on in the paper.

¹³⁰ Wiles at [*57] making reference to the case of *Maharaj Singh v. State of Uttar Pradesh* [1976] 1 S.C.R. 1072, 1083.

writ.¹³¹ The court often waives the court fees and appoints commissions to investigate matters on behalf of applicants.¹³² There has been some protest by respondents that the courts are disregarding traditional court procedures.¹³³ However the Chief Justice has responded by highlighting the “need to forge new tools...for the purpose of making fundamental rights meaningful for the large masses”.¹³⁴ While the author appreciates the efforts of the Indian courts in providing greater court access to the masses, the author believes that a balance must be struck between allowing more access to the courts and maintaining the efficient running of the administration of justice. The Indian courts are notoriously congested. The author subsequently advocates an adherence to normal court procedures with an increase in the capacity of legal aid and wider *locus standi* that allows affected individuals to be represented by interest groups.

2.3 CONCLUSION

There are no sustainable reasons why justiciable socio-economic rights should not be entrenched in the Zambian Constitution. This study has established that, contrary to what is commonly supposed, all rights, including civil and political rights, have positive and negative dimensions. Socio-economic rights are not imprecise because there are established standards by which states can assess their fulfilment of rights. Although these rights are to a large extent realisable progressively, this term does not grant a licence to states to postpone their obligations. As with civil and political rights, socio-economic rights only interfere with free markets to the extent that rights are violated. It has become increasingly acceptable for judges to be involved in matters concerning policy implementation. South Africa represents one of those countries where courts have succeeded in observing the fine lines of the separation of powers without shying away from deciding on socio-economic rights questions. Negative perceptions against these rights are increasingly being dispelled as more and more jurisprudence on the enforcement of these rights is emerging. As Scott and Macklem put it:

¹³¹ *Mumbai Kangar Sabha, Bombay v. M/S Abdulbhai Faizullahbhai* [1976] 3 S.C.R. 591, 597.

¹³² Wiles at [*57].

¹³³ Op cit at [*58].

¹³⁴ Ibid citing *Bandhua Mukti Morcha v Union of India*, [1984] 2 S.C.R. 67, 71, 73 (1983).

If there is no forum that is socially recognised as authoritative and which individuals or communities of people similarly disadvantaged can make submissions about the profound barriers they face in attempting to lead meaningful lives, those difficulties will increasingly be deemed irrelevant, and the underlying values that social rights are designed to protect will diminish in meaning and importance.¹³⁵

Having established the validity of justiciable socio-economic rights the next Chapter promotes using the Bill of Rights as the best means of implementing them in Zambia.

¹³⁵ Scott and Macklem at [*28].

CHAPTER 3: METHODS OF PROTECTING SOCIO-ECONOMIC RIGHTS IN DOMESTIC CONSTITUTIONS

3.1 INTRODUCTION

There are various ways in which socio-economic rights have been given effect domestically in different jurisdictions, both indirectly and directly. This Chapter will look at the different ways in which socio-economic rights have been protected in various countries around the world namely: the use of directive principles of state policy; protection through guaranteeing civil and political rights; and the Bill of Rights; through national legislation; and through public institutions. In Zambia socio-economic rights are contained in the directive principles of state policy, they are never referred to as rights as they are non-justiciable.¹³⁶ As earlier mentioned there is no jurisprudence on socio-economic rights in Zambia. This Chapter will also evaluate the different methods of implementing socio-economic rights and justify the need for them to be enshrined in the Bill of Rights of the Zambian Constitution.

¹³⁶ s 112 of the Constitution of Zambia Chapter 1 of the Laws of Zambia. The following are the directive principles of state policy:

- (a) the State shall be based on democratic principles;
- (b) the State shall endeavour to create an economic environment which shall encourage individual initiative and self-reliance among the people and promote private investment;
- (c) the State shall endeavour to create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment;
- (d) the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities;
- (e) the State shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all;
- (f) the State shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable;
- (g) the State shall take measures to promote the practice, enjoyment and development by any person of that person's culture, tradition, custom or language insofar as these are not inconsistent with this Constitution;
- (h) the State shall strive to provide a clean and healthy environment for all;
- (i) the State shall promote sustenance, development and public awareness of the need to manage the land, air, and water resources in a balanced and sustainable manner for the present and future generation; and
- (j) the State shall recognise the right of every person to fair labour practices and safe and healthy working conditions.

3.2 INDIRECT WAYS OF IMPLEMENTING SOCIO-ECONOMIC RIGHTS

Socio-economic rights are more commonly given effect indirectly through the interpretation of civil and political rights where socio-economic rights are not enshrined in a constitution.¹³⁷ The following are examples of indirect protection given to these rights in different jurisdictions:

3.2.1 Directive principles of state policy: comparative practices on their significance

Directive principles of state policy are meant to be non-justiciable aspirations of the State. They are subsequently contained in a constitution separate from the Bill of Rights. This section will compare and contrast the protection given to socio-economic rights under directive principles of state policy in Nigeria and India.

3.2.1.1 Directive principles of state policy in Nigeria

In Nigeria directive principles of state policy were first introduced in the Second Republic Constitution of 1979. They included aims and principles relating to “social well-being, social justice political stability and economic growth”.¹³⁸ Since their creation, the Nigerian courts have re-affirmed the non-justiciability of these rights. In *Okogie v. Attorney General of Lagos State*¹³⁹ the plaintiff, the trustee of Roman Catholic schools, contested the abolishment of private primary schools on the ground that it contravened the right to freedom of expression.¹⁴⁰ The government argued that private schools were contrary to the principle of “equal and adequate educational opportunities” provided for in the directive principles of state policy. The Court ruled that the words “equal and adequate educational opportunities” did not necessarily restrict persons from forming private educational institutions and that the directive principle could not override a fundamental justiciable right.¹⁴¹ This decision was

¹³⁷ Sandra Liebenberg, ‘The protection of economic and social rights in domestic legal systems’, in Asbjorn Eide et al (eds.), *Economic, Social and Cultural Rights*, 2nd ed 2001 Kluwer Law International, The Netherlands p 55-84 (now referred to as “Leibenberg”) at p 71.

¹³⁸ Dejo Olowu, ‘Comparative constitutionalism and rights: human rights and avoidance of domestic implementation: the phenomenon of non-justiciable constitutional guarantees’, 2006 69 *Sask. L. Rev.* 39 (now referred to as “Olowu”) at [*56].

¹³⁹ (1981) 1 N.C.L.R. 152.

¹⁴⁰ Olowu at [*58].

¹⁴¹ Ibid.

upheld in the case of *Adewole v. Jakande, Governor of Lagos State*.¹⁴² The directive principles of state policy were only first referred to as rights in the 1991 case of *Uzuokwu v. Ezeonu II*¹⁴³ where the Court stated that: "...there are rights which may pertain to a person which are neither fundamental nor justiciable in the court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution".¹⁴⁴

In the case of the *Attorney General of Ondo State v The Attorney General of the Federation of Nigeria*,¹⁴⁵ the Supreme Court Nigeria recognised that, while the fundamental objectives and directive principles of state policy are non-justiciable: "they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them ... the Directive Principles can be made justiciable by legislation".¹⁴⁶

Like most states with directive principles of state policy the Nigerian courts have shown reluctance to give effect to socio-economic rights where they are not specifically made justiciable, perhaps for fear of contravening the doctrine of separation of powers or for other reasons referred to in the previous chapter. The Indian courts, by contrast, have not let such fears hold back the alleviation of the poverty and suffering of the masses, this model will be examined below.

3.2.1.2 Directive principles of state policy in India

In India, socio-economic rights are also recognised as directive principles of state policy and lay dormant in the Constitution for many years after they were created. However, in the 1980's the Indian Supreme Court took it upon itself to redress the plight of the impoverished masses and make the socio-economic values count and so began a stream of what is referred to as "social action litigation". In *People's Union for Democratic Rights v. Union of India*,¹⁴⁷ a workers' advocacy group wrote a letter to the Supreme Court on behalf of a group of construction workers who were being

¹⁴² (1981) 1 N.C.L.R. 152.

¹⁴³ (1991) 6 N.W.L.R. (pt. 200) 708 (Nig. C.A.).

¹⁴⁴ Op cit at 761-762.

¹⁴⁵ (2002) 9 Sup. Ct. Monthly 1 (Nig. Sup. Ct.)

¹⁴⁶ Op cit at 96-97.

¹⁴⁷ A.I.R 1982 S.C at 1475.

paid less than the minimum wage.¹⁴⁸ The Court admitted the letter under its “epistolary jurisdiction” and held that the workers’ group had standing on behalf of the construction workers.¹⁴⁹ The Court found that payment of less than the minimum wage amounted to a violation of Article 23 of the Indian Constitution which prohibits human trafficking and forced labour.¹⁵⁰ It went further to say that the government had failed in its duty under the Constitution to protect the workers and ensure that the minimum wage was enforced.¹⁵¹

The Indian Supreme Court has interpreted Article 21, the right to life, very widely to embrace various directive principles of state policy. In the case of *Olga Tellis v. Bombay Municipal Corporation*,¹⁵² a group of pavement and slum dwellers petitioned the Court against the arbitrary eviction from the pavement and slum dwellings by the Bombay Municipal Council. The petitioners claimed that in being evicted they were being deprived of their livelihood, under Article 39 of the directive principles of state policy,¹⁵³ and subsequently their right to life under the Bill of Rights. The Supreme Court of India upheld the claim. Thus, using the fundamental right to life to give effect to petitioner’s socio-economic needs under a directive principle of state policy.

In the case of *Pashim Banga Khet Mazdoor Samity and Others v State of West Bengal and another*,¹⁵⁴ the applicant had received serious head injuries and suffered a brain haemorrhage as a result of falling out of a train.¹⁵⁵ He was taken to several public hospitals all of which refused to treat him because, either the hospital did not have the necessary treatment facilities, or because it did not have any room for him to be

¹⁴⁸ Jeanne M. Woods, ‘Emerging paradigms of protection for “second -generation” Human Rights’, 6 *Loy. J. Pub. Int. L.* 103 (hereinafter referred to as “Jeanne M. Woods”) at [*107].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² Supreme Court of India, 1985 AIR 1986 Supreme Court 18.

¹⁵³ Article 39 of the Indian Constitution provides that “the state shall direct its policy toward securing that the citizens, men and women equally, have the right of adequate means of livelihood” so that “ownership and control of material resources of the community are so distributed as to best serve the common good”.

¹⁵⁴ (1996) SOL Case No. 169, 4 S.C.C. 37, 3 SCJ 25, 2 CHRLD 109 (Supreme Court of India) cited in *Soobramoney v Minister of Health (Kwa-Zulu-Natal)*, Constitutional Court of South Africa, Case CCT 32/97 27th November 1997 at www.law.wits.ac.za/judgements/soobram.html [accessed] on 14th March 2007 at para [18].

¹⁵⁵ *Ibid.*

treated.¹⁵⁶ Subsequently the applicant was forced to seek treatment from a private hospital.¹⁵⁷ The judgment revealed that in fact the applicant could have received treatment from more than one of the hospitals that had refused to treat him.¹⁵⁸ The court found that the persons responsible for making the decision not to treat him were guilty of misconduct¹⁵⁹. In its ruling the Court said as follows:

The Constitution envisages the establishment of a welfare state at the federal level as well as the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.¹⁶⁰

3.2.1.3 Critique of directive principles

It is clear that directive principles lack the coercive power. Thus, when courts through judicial interpretation try to enforce them, they land into legitimacy problems. This has been the key backlash to the jurisprudence developed in India on this issue. The rulings of the courts there have sometimes been ignored by the government on the grounds that the courts have been too intrusive into the exercise of state powers. Such reactions compromise the authority of the Court and underline the inappropriateness of directive principles of state policy. Although tensions between the court and other branches of government also arise where socio-economic rights are enshrined in the Bill of Rights, as nearly occurred in South Africa with the *Treatment Action Campaign* case,¹⁶¹ in the case of the latter, courts derive a legitimate basis for their action from the actual rights rather than conceived ones. It has thus been observed that the Indian judiciary have come to realise the potential risks of judicial activism and

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ This case will be discussed when dealing with the Bill of Rights approach to protecting socio-economic rights.

has begun to backtrack from the initial cases of the 1980's by adopting a more cautious approach.¹⁶²

It must also be pointed out that the directive principles of state policy approach depends heavily on the will of the judiciary to construe the principles as fundamental rights, to accept the standing of otherwise unaffected people or groups and to actively engage itself in the promotion and supervision of the socio-economic condition of the people.¹⁶³ As a result, one cannot be certain about the outcome of a case. This may therefore deter individuals from instituting cases before courts.

On the other hand one can argue that by interpreting civil and political rights broadly with the aid of directive principles of state policy, the Indian Supreme Court conceded that civil and political rights were in and of themselves not sufficient to protect human dignity and access to basic needs. The Indian courts have had to be creative to give effect to socio-economic rights in order to compel the government to fulfil its obligations. Without a binding Bill of Rights with socio-economic rights, states may implement these rights at their own pace without any fear of being held accountable.

3.2.2 Protection of socio-economic rights through civil rights guarantees

There are many countries whose constitutions protect civil and political rights only and socio-economic rights are not even recognised as aspirations of the state. Such constitutions reflect a liberal view of rights as negative injunctions. They also represent the traditional view that courts have no role to play in resource redistribution or, better still, that the guarantee of civil and political rights creates sufficient conditions for individuals to fulfil their potential and improve their socio-economic status.

A number of international monitoring bodies and some domestic jurisdictions have interpreted civil and political rights in a manner that gives implied protection to socio-economic rights. This jurisprudence can be interpreted in two ways. The first is that it

¹⁶² Ibid referring to the case of *Himachal Pradesh v. A Parent of a Student of Medical College, Simla (Medical College)* [1985] 3 S.C.R. 676, 677 where the court held that it cannot command the legislature or the executive to initiate legislation because the Constitution does not assign it that role.

¹⁶³ Wiles at [*59].

helps to support the view that civil and political rights can adequately protect socio-economic rights. The second is the opposite of the first. It is that this jurisprudence helps to demonstrate that civil and political rights are inadequate to protect people in the face of socio-economic depravity. Thus, if courts are already impliedly protecting these rights, then there is no point in denying their usefulness and indeed their justiciability.

3.2.2.1 Protection of socio-economic rights by the European Court of Human Rights

The European Court of Human Rights (ECHR), which has powers to receive petitions from individuals, non-governmental organisations and groups alleging violations of the rights protection in the European Convention for the Protection of Human Rights and Fundamental Freedoms, has interpreted civil and political rights broadly to give some protection to what are clearly socio-economic claims.¹⁶⁴

In *Feldbrugge v. The Netherlands*,¹⁶⁵ a woman argued that her right to a fair trial had been violated because she was denied the opportunity to appeal a decision by the state's medical expert that she was fit to return to work.¹⁶⁶ The Court held that her interest in the sickness benefits was a "civil right" under Article 6(1) because although it contained elements of both private and public law, the private law elements were more predominant as the insurance was paid for by individuals and employers and insurance coverage was based on a private contract normally linked to employment.¹⁶⁷

In *Salesi v. Italy*,¹⁶⁸ the Court used the rule in *Feldbrugge* to appeals from denials of disability benefits that were entirely state-funded¹⁶⁹. No distinction was made between welfare benefits that were clearly governed by public law and employment benefits that were largely governed by private law.¹⁷⁰

¹⁶⁴ Op cit [*121].

¹⁶⁵ 8 Eur. Ct.H.R.R. 425 (1986).

¹⁶⁶ Jeanne M. Woods at [*121].

¹⁶⁷ Ibid at [*121].

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

The ECHR has also used the non-discrimination provision under the Convention to protect socio-economic rights. In *Gaygusuz v. Austria*,¹⁷¹ the Court held that denial of emergency pension assistance based on nationality was a violation of Article 14 of the Convention, as read with Article 1 of Protocol 1.¹⁷² Mr Gaygusuz was a Turkish national who had lived in Austria for around eleven years during which had been making the required contributions to the unemployment insurance fund.¹⁷³ He became ill and was unable to work and so applied for an emergency advance on his pension.¹⁷⁴ The state denied his application on the basis that he was not an Austrian national as required by the Unemployment Insurance Act. The ECHR ruled that because the entitlement to emergency advance on his pension was connected to pension contributions, Article 1 of Protocol 1, which protects property rights, applied, having defined the pension as a “possession” within the meaning of the Article.¹⁷⁵

3.2.2.2 Protection of socio-economic rights by the state courts in the United States of America

The constitutional practice in the United States of America is very interesting because the American Constitution is one of the most traditional constitutions in that it affirms civil and political rights only. While the Federal Supreme Court has been reluctant to read socio-economic rights into the Constitution,¹⁷⁶ states courts have displayed a more positive attitude to these rights.

For example, the Texas Supreme Court in *San Antonio Independent School District v. Rodriguez* and in *Edgewood v. Kirby*,¹⁷⁷ the Court held that the Texas education funding system contravened the right to education in the Texas Constitution.¹⁷⁸ The Court ruled that under the Texas constitution the state had a duty to provide “efficient

¹⁷¹ App. No. 17371/90, 23 Eur. Ct. H.R. 364 (1997).

¹⁷² Jeanne M Woods at [*124].

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ See *De Shaney v Winnebago County Department of Social Services* 489 U.S. 189 (1989), *Dandridge v Williams* 397 U.S. 471 (1970) and *San Antonio Independent School District v Rodriguez* 411 U.S. 1 (1973).

¹⁷⁷ 777 S.W. 2d 391 (Tex. 1989).

¹⁷⁸ Jeanne M. Woods [*126].

education” and that because the public school funding system was inequitable it was constitutionally “inefficient”.¹⁷⁹

In *McCain v. Koch*,¹⁸⁰ the New York Appellate Division considered an application by homeless families to have emergency “safe, suitable and adequate” housing, relocation assistance, school transportation assistance and notice and hearing before termination of access to emergency shelter.¹⁸¹ They also appealed the state’s decision to award homeless families cash instead of shelter, against the background that homeless single individuals or couples that were childless were given shelter, on the basis that their right to equal protection was being violated.¹⁸² The Court awarded the families increased educational transportation allowances under the right to education, without specifying the amount.¹⁸³ The Court granted the right to notice and hearing upon termination of housing benefits but excluded housing transfers from this right.¹⁸⁴ The Court refused to accept that there was a right to “reasonable minimal standards” of emergency shelter ruling that the adequacy of benefits awarded to the indigent was subject to the prerogative of the legislature.¹⁸⁵

3.2.2.3 Critique of the protection of socio-economic rights through civil and political rights

The cases cited illustrate lucidly that where socio-economic rights are not directly provided for in the Bill of Rights the country’s citizens are at the mercy of the judiciary. While many countries have constitutions that recognise civil and political rights only, very few have been interpreted to advance access to socio-economic needs and benefits. In the context where judges have historically been conservative such as in Zambia, civil and political rights cannot be the solution to socio-economic deprivation and bridging socio-economic inequalities. As the Committee on Economic Social and Cultural rights has stated:

¹⁷⁹ Ibid.

¹⁸⁰ 117 A. 2d 198 (N.Y. App. Div. 1986).

¹⁸¹ Jeanne M. Woods at [*127].

¹⁸² Ibid.

¹⁸³ op cit [*128].

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

Full realisation of human rights can never be achieved as mere by-products, or fortuitous consequence of some other developments no matter how positive. For that reason suggestions that the full realisation of economic, social and cultural rights will be a direct consequence of, or will automatically flow from enjoyment of civil and political rights are misplaced.¹⁸⁶

Even where judges are judicially active, interpreting civil and political rights in the manner demonstrated above raises the same legitimacy concerns that directive principles of state policy raised as has been shown above.

Socio-economic rights play an important role in facilitating access to basic services and goods. They are key to ending poverty, which in turn prevents individuals from enjoying other rights. Socio-economic rights are also an end in themselves. It is therefore critical that they be regarded as rights in themselves and should be protected expressly in the Constitution and not through the agency of civil and political rights.

3.3 DIRECT PROTECTION OF SOCIO-ECONOMIC RIGHTS IN A BILL OF RIGHTS

The 1990's brought a wave of constitutional change to the African continent following the demise of communism and the advent of democracy.¹⁸⁷ Socio-economic rights were included in the Bill of Rights of the Constitutions of Benin (1990), Cape Verde (1990), Sao Tome and Principe (1990), Burkina Faso (1991), Gabon (1991), Madagascar (1992), Mali (1992), Niger (1992), Togo (1992), Seychelles (1993) and South Africa (1996).¹⁸⁸

The jurisprudence from South Africa has helped to demonstrate that socio-economic rights are justiciable. They are rights that are capable of content and the courts have been able to define the obligations of states. This jurisprudence has highlighted that socio-economic rights are justiciable both in their negative and positive sense. In

¹⁸⁶ Statement to the world conference on human rights on behalf of the Committee on Economic, Social and Cultural Rights adopted by the Committee on ESCR, 7th Session, Supp. No. 2, p. 82, 3 UN Doc. E/1993/22E/C.12/1992/2, Annex III, (1993).

¹⁸⁷ Danwood Mzikenge Chirwa, 'A full loaf is better than half: the constitutional protection of economic, social and cultural rights in Malawi', (2005) Vol. 49, Issue 2, *Journal of African Law*, 207-241 (now referred to as "Chirwa") at p 207.

¹⁸⁸ Chirwa, at p 207.

Government of South Africa v. Grootboom,¹⁸⁹ which dealt with a claim by a group of squatters for temporary shelter under section 26 of the Constitution, the Constitutional Court stated that the question in South Africa was no longer whether socio-economic rights were justiciable or not, for clearly they were. It held that at least these rights should be negatively protected from infringement.¹⁹⁰ Thus, the state was found liable for, among other things, violating this negative obligation for evicting the people in an inhumane fashion. In a number of other cases, the Constitutional Court has found violations of the negative obligation implicit in these rights.¹⁹¹

The same case developed a benchmark for measuring compliance by states with their positive obligations - the so-called reasonableness test. According to the court:

To be reasonable, measures cannot leave out of account the degree and extent of denial of the right they endeavour to realise. Those whose needs are the most urgent and those whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right....If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.¹⁹²

The court in *Grootboom* found that the government housing policy was not reasonable because “it fails to recognise that the state must provide for those in desperate need”.¹⁹³

The *Grootboom* case was confirmed in *Minister of Health v. Treatment Action Campaign*.¹⁹⁴ In this case, the government appealed against a High Court decision ruling that the government should provide the mother-to-child HIV prevention drug Nevirapine in public health facilities throughout the country.¹⁹⁵ Previously the government, which had been offered the drug free of charge for five years by the manufacturer, had only administered the drug in a pilot scheme in a few public health

¹⁸⁹ 2000 (11) BCLR 1169 (CC) .

¹⁹⁰ Ibid at para [34].

¹⁹¹ E.g *Treatment Action Campaign* case supra n. 101 at para [80].

¹⁹² *Grootboom* at para [44].

¹⁹³ Op cit at para [66].

¹⁹⁴ Supra n. 101.

¹⁹⁵ Jeanne M. Woods at [*117].

clinics in three of the nine provinces countrywide.¹⁹⁶ The petitioners argued that doctors in public health institutions should not be prevented from administering the drug where the patients had given their informed consent.¹⁹⁷ On appeal the Constitutional Court affirmed that socio-economic rights were justiciable and that judges must exercise their powers to effect policy or legislation where it was appropriate to do so.¹⁹⁸ This was significant in that it showed willingness on the part of the courts to engage in the issues despite the potential resource implications and the polycentricity of the claim. It reaffirmed the reasonableness standard required of states. However it obliges government to satisfy the needs of “those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril”,¹⁹⁹ in this case the infants who require protection from the transmission of HIV/AIDS from their mothers.²⁰⁰ Most importantly, it reiterated that the concept of separation of powers is not absolute and that courts could make decisions that impact on policy.²⁰¹

Through the development of the reasonableness test, South African courts have been able to steer clear of usurping the functions of other branches of government. Although the standard has been subjected to sustained critiques, it provides a basis for regulating judicial intervention and non-intervention in policy making and implementation. The Bill of Rights in South Africa has given the court the legitimacy to decide on socio-economic rights issues and the government has less room to raise the legitimacy question when courts find it wanting in its obligations.

3.4 NATIONAL LEGISLATION

Under Article 2(1) of the ICESCR the use of legislation to realise socio-economic rights is described as ‘highly desirable’ and ‘in many cases indispensable’.²⁰² Legislation is crucial in that it provides the details of how the rights are to be implemented. It has been observed, for example, that Sweden has a very strong welfare system with strong legislation implementing socio-economic rights.²⁰³

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ *Treatment Action Campaign*, at para [*44].

²⁰⁰ Jeanne M. Woods at [*118].

²⁰¹ Pieterse at p. 403.

²⁰² General Comment No. 3 at para 3.

²⁰³ Wiles at [*40].

However, the Swedish government has begun to make cutbacks to welfare benefits that have led the judiciary to take a more active role in cases concerning socio-economic rights such as housing.²⁰⁴ As a result, there is very little litigation in that area, indicating that it is expedient to have good social policies and legislation in place.²⁰⁵

Some Constitutions provide that national legislation should be subject to international law which provides a broader base for the application of human rights and socio-economic rights in particular. In South Africa the Constitution requires the courts to ‘prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.²⁰⁶ This is a broader requirement than that under United Kingdom law.²⁰⁷ In the United Kingdom, there is a presumption by the courts that parliament intended to legislate in line with its international law obligations.²⁰⁸ Where there is any ambiguity in the national legislation the courts will refer to the international instrument to clarify that particular point of law.²⁰⁹ The United Kingdom’s 1998 Human Rights Act requires that the courts interpret the legislation in a manner that is consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms.²¹⁰ Before the Human Rights Act, the courts used to resort to some highly creative methods of giving effect to socio-economic rights.²¹¹ For example, in the 1990’s the Conservative government decided to deny asylum seekers welfare benefits if they made their application late.²¹² To redress this situation the Court of Appeal resorted to an old 1803 case²¹³ in which the claimants were ordered to feed a starving family whose father was of a foreign origin.²¹⁴ As Wiles points out, “[s]uch creativity of interpretation ... is not always possible, and does not present a reliable approach”.²¹⁵

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Section 233 of the Constitution of South Africa, 1996.

²⁰⁷ Leibenberg p 82.

²⁰⁸ Leibenberg at p 81.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Wiles at [*41].

²¹² Ibid.

²¹³ *R v. Inhabitants of Eastbourne*, (1803) 4 East. 103, 107.

²¹⁴ Wiles at [*41].

²¹⁵ Ibid.

The advantage of using legislation to protect socio-economic rights is that it is specific which courts generally prefer.²¹⁶ It is also the democratic way of implementing rights as legislation is passed by the legislature which is representative of the people. It may provide for administrative remedies which may be quicker, cheaper and more accessible to poorer people than the court system.²¹⁷ But the problem with legislation is that it may not provide directly enforceable socio-economic rights.²¹⁸ Also, there are no guarantees that even if adequate legislation was put into place it would remain there as it is subject to repeal and amendment without any special procedure unlike rights contained in a Bill of Rights. This may result in political compromises that deprive vulnerable groups of core rights.

3.5 NATIONAL INSTITUTIONS AS PROTECTORS OF SOCIO-ECONOMIC RIGHTS

Public institutions such as human rights commissions, ombudsman offices and public interest groups have a potentially important role to play in the protection of human rights.²¹⁹ They can undertake a wide range of promotional activities in the area of human rights. Through these activities it is possible that socio-economic rights can be given some protection.

A wide range of countries in Africa have established human rights commissions. They include South Africa, Namibia, Uganda and Ghana. Section 184(3) of the South African Constitution, for example, grants the Commission the power to require organs of state to report to it on measures they have taken to realise the rights to housing, health care, food water, social security, education and the environment.²²⁰ The Commission can use this information to:

- (a) report to Parliament and the President on the observance of economic and social rights;
- (b) recommend changes to policy and legislation to relevant state organs;
- (c) help affected persons to get redress for violations of their socio-economic rights;
- (d) facilitate mediation or negotiation; and

²¹⁶ Leibenberg at p 80. Also note the comment of the Nigerian Supreme Court *supra* at n. 150.

²¹⁷ Leibenberg at p 80.

²¹⁸ *Ibid.*

²¹⁹ Leibenberg at p 82.

²²⁰ Section 184(3) of the Constitution of South Africa, 1996.

(e) conduct further research or investigations.²²¹

As part of its role in protecting socio-economic rights it has even joined itself as *amicus curiae* in *Grootboom*. In South Africa the Public Protector plays an indirect role in protecting socio-economic rights.²²² Under section 182 of the Constitution its functions are: “to investigate any improper conduct in state affairs or public administration, to report such conduct, and to take appropriate remedial action”. Mubangizi argues that in so doing, the Public Protector protects and enforces human rights as well as reduces human rights abuses.²²³

National Institutions can be an important tool in protecting socio-economic rights. The good thing about national institutions is that they are more accessible than courts. However, they generally lack full judicial powers and subsequently do not offer the full range of remedies. They are useful in easing the courts’ burden for the more straight forward cases but, for cases requiring the full weight of the law, a court is more suitable. Subsequently national institutions can only play a complimentary role to the courts. They cannot replace the role of courts or judicial remedies. As the Committee on Economic, Social and Cultural Rights has stated: “a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary”.²²⁴

3.6 A COMBINATION OF DIRECT AND INDIRECT PROTECTION OF SOCIO-ECONOMIC RIGHTS

Some countries use a combination of direct and indirect protection of socio-economic rights. This is done by putting some socio-economic rights in the Constitution and leaving others as directive principles of state policy. This section will consider the situation pertaining in Malawi, Namibia, Uganda and Ghana.

The only thing in favour of this combined approach is that it at least provides protection for some of the socio-economic rights that are contained in the Bill of Rights. However, on the other hand, leaving some rights out of the Bill of rights and

²²¹ See the powers and functions of the Human Rights Commission in section 184 of the Constitution of South Africa, 1996 and in the Human Rights Act No. 54 of 1994.

²²² Mubangizi at p. 8.

²²³ Mubangizi at p. 8.

²²⁴ General Comment 9 at para 9.

indeed out of the Constitution altogether means that there is no holistic approach to protecting socio-economic rights. The common theme running through the protection of socio-economic rights in all the countries mentioned is the lack of protection of basic socio-economic rights such as the right to food, health and housing in the Bill of Rights. Also significant is the failure of courts to be creative with the protection of rights that are not contained in the Bill of Rights in the way that the courts have been in India. Malawi has the right to development which has not yet been used to give effect to basic socio-economic rights that have not been included in the Bill of Rights.²²⁵ Similarly, Ghana has not used the umbrella clause in the Bill of Rights which protects rights that are not specifically mentioned in the Bill of Rights that are necessary in a democracy and which ensure the “freedom and dignity of man”²²⁶. The limited jurisprudence from these countries shows that the socio-economic rights contained in the Bill of Rights can be protected and that those that are not contained in the Bill of Rights generally are not. This leads to an imbalance in the protection of human rights and results in substantive inequality for the disadvantaged. Countries cannot pick and choose which rights to put in and which ones to leave out as that assumes that some rights are more important than others. This leads to the question - who gets to decide which socio-economic rights get protected and which do not? And on what criteria? The former Chief Justice of the Indian Supreme Court had this to say on the balance between the justiciable and non-justiciable parts of the Indian Constitution:

...the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution.²²⁷

This affirms the fact socio-economic rights and civil and political rights are interdependent and indivisible and should be treated as such in the Bill of Rights of all Constitutions.

²²⁵ Chirwa at p. 225.

²²⁶ Article 33(5) of the Constitution of Ghana.

²²⁷ ‘Fundamental rights, fundamental duties and directive principles of state policy’ (India) available at <http://www.ncert.nic.in/textbooks/XI/indi-cont/CHAPTER4.pdf> [accessed 01/03/07] citing *Minerva Mills v. Union of India* AIR 1980 Supreme Court 1789.

3.7 CONCLUSION

As the jurisprudence referred to above shows, unless there is political will on the part of the executive branch of government there is no way that courts will uphold socio-economic rights unless there is clear constitutional protection for the enforcement of those rights. The efforts made by the courts in countries where socio-economic rights are not justiciable, particularly in India, are commendable but lack the legitimacy and guarantees provided by enshrining them in the Bill of Rights. Likewise the use of national legislation and public institutions, while useful, cannot by themselves guarantee full protection of these rights. One must have the ultimate right to claim their socio-economic rights from the government if they are not being provided. If only governments always heard the cries of their subjects and remedied their problems but the reality is that they do not – at least not all the time. Citizens should be able to hold the government accountable without waiting five years till the next election. Judicial remedies are necessary and should be made available. As the Committee on Economic, Social and Cultural Rights states:

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions...While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.²²⁸

For socio-economic rights to be upheld they must first be recognised by the judiciary, that is half the battle. The other half is to get the government to acknowledge the legitimacy of those rights and this dissertation argues that enshrining them in the Bill of Rights is the best way to do that.

If the Constitution is not amended what then is the alternative to having socio-economic rights enshrined in the Bill of Rights of the Zambian Constitution? It would have to be the Indian approach combined with good national legislation and national

²²⁸ General Comment 9 at paras 9 and 10 cited in Scott and Alston at p216.

institutions like the Human Rights Commission with greater powers. But this comes a poor second best as the approach lacks certainty, legitimacy and consistency²²⁹.

Having shown and critiqued the various models of protecting socio-economic rights and having concluded that enshrining socio-economic rights in the Bill of Rights is the best approach for their protection, the next chapter looks at the need for justiciable socio-economic rights in the Zambian Bill of Rights.

²²⁹ Wiles at [*59].

CHAPTER 4: THE NEED FOR JUSTICIABLE SOCIO-ECONOMIC RIGHTS IN THE ZAMBIAN CONSTITUTION

4.1 INTRODUCTION

The previous two chapters have made arguments for the introduction of justiciable socio-economic rights in the Bill of Rights in general. This chapter of the study will now look at why Zambia in particular needs these rights in its Bill of Rights. The first part of this chapter will look at why the current government framework does not protect socio-economic rights adequately and how enshrining socio-economic rights in the Bill of Rights will improve the protection of these rights; the second part will look at how some of the conceptual issues raised in Chapter 2 can be addressed with regard to the implementation of socio-economic rights in Zambia; and the third part will discuss the role of socio-economic rights in reducing poverty.

PART I

The concept of separation of powers, though not specifically included in it, is well established in the Constitution which assigns different functions to the executive, legislature and the judiciary.²³⁰ This part will look at the different arms of the Zambian government and analyse why the administrative, legislative and judicial system Zambia is using has failed to give adequate protection to socio-economic rights.

4.2 THE INADEQUACY OF LEAVING SOCIO-ECONOMIC POLICY-MAKING TO EXECUTIVE DISCRETION

The powers of the executive are wide and far-reaching, particularly those of the President, as Professor Anyangwe puts it:

Constitutionally, the powers of the African President are so tremendous that the office of the President has the appearance of a fourth governmental organ. He is the head of Government, head of State, head of the political party in power, and commander-in-chief of the defence forces; he has war powers, emergency powers, and treaty-making powers; he has power to initiate laws, to appoint and terminate

²³⁰ Carlson Anyangwe, 'The Zambian constitution and the principles of constitutional autochthony and supremacy', (1997) Vol 29 *Zambia Law Journal*, p 1 – 32 (now referred to as "Anyangwe") at p 18.

appointments to major public offices, to constitute and abolish offices, to nominate a limited number of legislators, to assent to and promulgate laws, to appoint when each session of Parliament shall commence, to prorogue the National Assembly, and to dissolve it; he presides at Cabinet meetings; confers honours and exercises the prerogative of mercy.²³¹ Thus, the African President enjoys ‘the strengths of the British Prime Minister and the United States President without the weaknesses of either’.^{232 233}

So how far does the executive use its powers to implement socio-economic rights? The executive does sometimes try and give effect to its international obligations through national policies such as the drives for “free” primary education, housing and to give free anti-retroviral drugs to HIV/AIDS carriers. However, these programmes have severe limitations: “free” primary education has hidden costs such as uniforms, learning materials and PTA²³⁴ fees;²³⁵ only 43,964 people are accessing free anti-retroviral drugs out of a possible 183,000 in need of them;²³⁶ housing schemes have only been accessible to people from middle to higher income families, while 70% of the urban population live in unplanned settlements²³⁷. Recently, the government embarked on demolitions of unplanned settlements in Lusaka giving only seven days notice and no alternative accommodation.²³⁸ The government’s policies on socio-economic issues have been criticised by Non-Governmental Organisations (NGOs) for failing to provide adequate access of economic and social amenities and services to the poor. This has largely been blamed on successive governments’ implementation of economic policies prescribed by International Financial Institutions (IFIs) such as the World Bank and the IMF.²³⁹ The Structural Adjustment Programmes (SAPs) mandated by the IFIs called for large scale privatisation of industries and liberalisation of the economy which led to massive job losses, neglect of basic

²³¹ See Articles 33(1), 29(1), 30, 31, 44, 46, 47, 49, 50, 59, 60, 61, 68, 78 and 88 of the Constitution of Zambia Chapter 1 of the Laws of Zambia.

²³² Anyangwe citing DG Morgan, ‘Zambia’s one party state constitution’, 1976 *Public law* 42.

²³³ The entire quotation is from Anyangwe at p 18.

²³⁴ Parent Teacher Association.

²³⁵ See JCTR Press Release: ‘JCTR study on education reveals no free primary education in Zambia, calls for scaling up of bursaries and school feeding programmes’, at <http://www.jctr.org.zm/bnb/prEDU06.html> [accessed January 2007]

²³⁶ World Health Organisation, ‘Summary country profile for HIV/AIDS treatment scale-up’, December 2005 at paras 2 and 5.

²³⁷ ‘Zambia parallel state report on economic social and cultural rights’, March 2005, hosted by the Jesuit Centre for Theological Reflection available at www.jctr.org.zm (now referred to as the Parallel Report) at p. 28 para 150.

²³⁸ The Post (newspaper of Zambia) Thursday 1 March 2007 at p. 1.

²³⁹ Parallel Report at p.40 section 4.2.

infrastructure, fees for basic needs such as health, an increase in the cost of living, and the problem of street children²⁴⁰. External debt has severely reduced the state's capacity to provide social and economic rights such as health and education²⁴¹. According to Jubilee-Zambia efforts to reach the Highly Indebted Poor Countries (HIPC) completion point²⁴² had strong policy implications for the realisation of an adequate standard of living.²⁴³

As a conditionality of debt relief under the HIPC Initiative, Zambia was required to develop a Poverty Reduction Strategy Paper (PRSP) with the participation of a spectrum of civil society groups.²⁴⁴ The PRSP was initially implemented between 2002 to 2004 but was extended to December 2005. The intention was to increase growth and reduce poverty by developing budgets that are pro-poor and pro-growth.²⁴⁵ The PRSP identified several barriers to reducing poverty: lack of growth, high inequality, heavy debt, high donor dependency, poor prioritisation, inadequate social safety nets and the scourge of HIV/AIDS.²⁴⁶ The Ministry of Finance and National Planning was in charge of co-ordinating the implementation, evaluation and monitoring of the PRSP with the participation of line ministries, international donors and civil society groups. Monitoring was done through budget monitoring and expenditure tracking.²⁴⁷ In monitoring the impact of the PRSP the Civil Society for Poverty Reduction (CSPR) stated that in practice policy implementation was effected by the government was “weak”.²⁴⁸ There was little improvement to access to health, education, water and sanitation and employment opportunities, particularly in the rural areas.²⁴⁹ Although there was an increase in enrolment from grades 1-7 as a result

²⁴⁰ Parallel Report at p. 42 para 219.

²⁴¹ Op cit at p. 46 para 232.

²⁴² To qualify for partial debt relief from the World Bank and IMF.

²⁴³ Parallel Report at p. 45 para 228.

²⁴⁴ Op cit p. 47 at para 237.

²⁴⁵ African Forum & Network on Debt & Development, ‘A critical analysis of the Poverty Reduction Strategy Paper (PRSP) process and outcomes. The case of Zambia’, April 2003 (now referred to as “AFRODAD”) at p. 2.

²⁴⁶ Op cit p 31.

²⁴⁷ Ministry of Finance and National Planning in co-operation with Deutsche Gesellschaft für Technische Zusammenarbeit (Dr. Thomas Krimmel and Chris Pain), ‘Appraisal study on monitoring systems in the framework of the Zambian PRSP – the role of districts and provinces’, October 2002 at p. 18.

²⁴⁸ Civil Society for Poverty Reduction, ‘Observing poverty reduction. A compilation of participatory poverty assessment summary reports 2002-2005’, September 2006 (now referred to as “CSPR”) at p. 65 available at <http://www.eldis.org/cf/search/disp/DocDisplay.cfm?Doc=Doc23290&Resource=f1poverty> [accessed 6/04/07].

²⁴⁹ Op cit p. 28 – 56.

of the policy on free basic education it resulted in a decrease in the quality of education due to inadequate facilities and teaching staff.²⁵⁰ Many pupils are not able to proceed to grade 9 and above because free basic education does not extend to secondary school.²⁵¹ Access to health care is hampered by long distances to health centres, drugs are in short supply, the cost of services is prohibitive and there are only a few staff.²⁵² Food security is threatened due to a decline in the farming industry;²⁵³ this was due to farmers' inability to afford subsidised inputs.²⁵⁴ Water and sanitation hardly improved because there was no programme to expand these facilities.²⁵⁵

The purpose of monitoring by civil society was to capture the views of stakeholders and ensure that implementation of the PRSP was on course.²⁵⁶ Communities complained that they were not involved in the identification, planning or implementation of strategies aimed at reducing their poverty. And clearly, although the CSPR was monitoring and reporting back to the Ministry of Finance and National Planning, most of their recommendations were not being heeded. The PRSP has also been criticised for being just another form of SAP as it came with privatisation of public utilities, removal of subsidies, the promotion of exports and foreign investment and import liberalisation,²⁵⁷ all of which are retrogressive measures in the fight for socio-economic rights. It is clear that in practice the PRSP did not take a human rights approach. Zambia has embarked on a similar Fifth National Development Plan from 2006-2010.²⁵⁸ If the government fails to give socio-economic rights the prominence they deserve, history will repeat itself.

The Committee on Economic, Social and Cultural Rights has made recommendations on some of Zambia's policies including that Zambia:

²⁵⁰ Op cit at p. 61 para 4.3.7.

²⁵¹ Ibid.

²⁵² Op cit at p 53 para 3.4.4.

²⁵³ Op cit at p. 58 Table 5.2.

²⁵⁴ Ibid.

²⁵⁵ Op cit at p. 63 para 4.3.9.

²⁵⁶ Op cit at p. 32

²⁵⁷ Parallel Report at p. 48 para 238.

²⁵⁸ CSPR at p. 65.

- (i) take its obligations under the ICESCR into account when negotiating with IFIs to ensure that Zambians rights under the Covenant are protected, particularly those of the most disadvantaged and the marginalised;²⁵⁹
- (ii) Provide street children with centres for rehabilitation for physical and sexual abuse as well as provide them with food, clothing, housing, health care and access to education as recommended by the Committee on the Rights of the Child (CRC/C/15/Add.206 at para 69);²⁶⁰
- (iii) Provide an adequate standard of living, “including through the provision of social safety nets to the most disadvantaged and marginalised groups, in particular those women and children who have been hardest hit by structural adjustment programmes, privatisation and debt servicing”;²⁶¹
- (iv) Strengthen its National Strategic Plan to make sure that it achieves its aim of providing free and compulsory basic education by 2015;²⁶² and
- (v) Endeavour to control the spread of the HIV virus by providing reproductive health services, especially to women and young people.²⁶³

The problem with relying on the executive to implement socio-economic rights is that it is under no obligation to create policies that take these rights into account. This can clearly be seen by government’s failure to negotiate policies with the IFIs that foster socio-economic rights. The PRSP, which was promising in that it involved the participation of the public through civil society groups, made few inroads into poverty reduction despite monitoring by the government and civil society. There are no mechanisms in place for holding the executive accountable for inadequate policies. There is need to enshrine socio-economic rights in the Bill of Rights so that governments can incorporate them into policy making and be held accountable when they do not. Accountability through the courts is necessary to define the state’s obligations in relation to socio-economic rights and to provide remedies when rights violations occur.

²⁵⁹ Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Zambia, U.N. Doc. E/C.12/1/Add.106 (2005) at para 36.

²⁶⁰ Op cit at para 46.

²⁶¹ Op cit at para 48.

²⁶² Op cit at para 54.

²⁶³ Op cit at para 53.

4.3 THE INADEQUACY OF THE LEGISLATURE AS A MEANS OF PROTECTING SOCIO-ECONOMIC RIGHTS

Under Article 62 of the Constitution ‘the legislative power of the Republic of Zambia shall vest in Parliament which shall consist of the President and the National Assembly’.²⁶⁴ The Constitution specifies the extent of Parliament’s legislative powers. The role of Parliament is to:

make law for peace, order and good government. But it may not pass any Act purporting to derogate from constitutional provisions. It may not alter the Constitution otherwise than in accordance with the stringent amendment procedure laid down in it for doing so.²⁶⁵

According to the principle of separation of powers, no branch of government can interfere with the powers assigned to another branch of government.²⁶⁶ However, without exception every successive government has had a clear majority in parliament. In 2001 the ruling MMD party had 69 out of 150 parliamentary seats²⁶⁷ and in 2006 it obtained 48.7% of the parliamentary seats²⁶⁸ in the elections held in those years. The President has the power to nominate up to eight members of parliament. Effectively the party in power controls the executive and the legislature making it easy for it to push forward its agendas. Consequently, if socio-economic rights are not on the agenda of the governing party they will not be given the attention due to them. Given that the directive principles are merely aspirations of the state, there is nothing obliging the legislature to create laws that promote socio-economic rights. Enshrining these rights in the Bill of Rights would make them foremost rather than incidental to the law-making process.

The legislature has however passed several pieces of legislation that support socio-economic rights in the field of equality and discrimination covering education and

²⁶⁴ Article 62 does not prevent the legislature from delegating the power to make statutory instruments and this is done in practice. See Anyangwe at p 17.

²⁶⁵ Anyangwe at p 15.

²⁶⁶ Ibid.

²⁶⁷ U.S. State Department at www.state.gov/g/drl/rls/hrrpt/2005/61599.htm [accessed on 9/03/07].

²⁶⁸ Elections 2006 Trust Fund: 3rd Quarter Progress Report, September 2006 on p 5 at www.undp.org.zm/undp-test/docs/etf%203%20progress%20report%20web.pdf [accessed on 9/03/07]

women's rights;²⁶⁹ general labour laws and conditions of service²⁷⁰; social security²⁷¹ and intestate succession.²⁷² Most of the enforceable rights are in the area of labour law. These Acts do not specifically provide for human rights however they can be interpreted to give effect to certain human rights such as the right to work and the right to a pension. However, there are some inadequacies in the, for example, the Minimum Wages and Conditions of Service Act Chapter 276 of the Laws of Zambia excludes domestic workers from its application. There are no unemployment, sickness or disability benefits. There is no specific legislation on the right to food, health, or education. Zambia cannot be described as a welfare state – far from it, the people have to fend for themselves. The provisions that do relate to socio-economic rights are not measured against a standard provided by a constitutional right. If the law is inadequate one has no further recourse. The people are at the mercy of the legislature to provide adequate laws to protect their rights many of which currently do not exist like the right to health, food, education and housing. There are government policies on these issues but they have not been converted into laws, for example the policy on free basic education. Without justiciable socio-economic rights in the Constitution laws inconsistent with these rights cannot be challenged and many rights that are not put into law are left unprotected.

4.4 THE FAILURE OF THE JUDICIARY IN PROTECTING SOCIO-ECONOMIC RIGHTS

The principle of constitutional supremacy implies that the judiciary is supposed to make sure that all laws are consistent with the Constitution.²⁷³ The powers are deducible from the following constitutional provisions:

- Article 1(3) provides that any law inconsistent with the Constitution is void to the extent of the inconsistency;

²⁶⁹ Section 108 of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia; sections 15A and 15B of the Employment Act Chapter 268 of the Laws of Zambia; the Marriage Act, Chapter 50 of the Laws of Zambia; the Maintenance Orders Act Chapter 55 of the Laws of Zambia; sections 4, 24, 12(c) and 25 of the Education Act Chapter 134 of the Laws of Zambia.

²⁷⁰ The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia; the Employment Act Chapter 268 of the Laws of Zambia; the Apprenticeship Act Chapter 275 of the Laws of Zambia,

²⁷¹ The National Pension Scheme Act, No. 40 of 1996 requires employers to deduct a certain percentage of their employees' salaries and put it in the national pension fund for their retirement.

²⁷² The Intestate Succession Act Chapter 59 of the Laws of Zambia.

²⁷³ Anyangwe at p 22.

- Article 28(1) gives the High Court the jurisdiction to hear matters related to the infringement of any of the fundamental rights and freedoms;
- Article 94(1) gives the High Court ‘unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law’; and
- Article 27 gives the courts the power to review the constitutionality of prospective legislation.

Socio-economic rights have only been in the Constitution as directive principles of state policy since 1996. The Constitution states that, although they may be referred to as rights in certain instances, socio-economic rights are non-justiciable²⁷⁴. It took 30 years before the concept of social action litigation²⁷⁵ was born so perhaps it has yet to come to Zambia. However, there are some aspects of the Zambian judiciary that make it unlikely, in particular when it comes to cases in which it comes into conflict with the executive. In Zambia judges are presidential appointees endorsed by the National Assembly.²⁷⁶ By their very nature, adjudicating socio-economic rights involves some policy decisions and judges should feel secure enough in their positions to be able to take a stand against the government if need be. In order to ensure that judges remain independent and impartial, judges must have security of tenure. However, the judiciary has experienced interference from the executive and perhaps as a result they have traditionally been conservative in their application of the law. The succeeding section will consider at the historical background to this problem.

4.4.1 The First Republic 1964 -1972

After independence Zambia was a multi-party democracy. However the jurisprudence over this period shows that the judiciary feared interference by the executive as illustrated by a number of cases. The case of *Kachasu v. Attorney General*²⁷⁷ involved a young Watch Tower believer who challenged the constitutionality of government regulations requiring school children to sing the national anthem and salute the national flag on religious grounds. The court upheld the regulations because the applicant had not established that they exceeded the interests of public security or public order. The court reasoned that national unity was a necessary requirement of

²⁷⁴ Article 111 of the Constitution, Chapter 1 of the Laws of Zambia.

²⁷⁵ Social Action Litigation is litigation that promotes the socio-economic welfare of people.

²⁷⁶ Section 93 of the Constitution of Zambia Chapter 1 of the Laws of Zambia.

²⁷⁷ [1967] ZR 145.

public security.²⁷⁸ In his judgment Blagden CJ cited the American case of *Minerville School District v Gobitts*²⁷⁹ where Frankfurter J said:

A grave responsibility confronts this court whenever in the course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty involved is liberty of conscience, and the authority is to safeguard the nation's fellowship, judicial conscience is put to the severest test.

This made it difficult for anyone to successfully challenge government measures intended to uphold public security.²⁸⁰

Any fears the judiciary may have had about crossing paths with the executive were confirmed in what is popularly known as the “Skinner saga”,²⁸¹ involving the first Chief Justice of Zambia, Mr. Justice James Skinner. In the Skinner saga two Portuguese soldiers had been convicted of illegally entering Zambia.²⁸² The sentence handed down was in excess of the presiding Magistrate’s powers.²⁸³ Judge Evans called for the case to be reviewed and found that indeed the Magistrate had exceeded his powers.²⁸⁴ Judge Evans made the following comments: “There was nothing sinister on the part of the prisoners; they divested themselves of their weapons before entering Zambia and they came openly across the border in daylight after exchange of non-abusive words with the Zambian immigration officer who called them across...”²⁸⁵ Upon hearing of Judge Evans comments, an enraged President Kaunda called upon the Chief Justice to apologise on behalf of the judge.²⁸⁶ The Chief Justice refused to do so on the ground that the judge had acted in his own judicial capacity and there was nothing that could be done about it.²⁸⁷ Angered further by this response the President sent his party’s youth cadets to storm the High Court where they stoned

²⁷⁸ There was a state of emergency at the time.

²⁷⁹ (1940) 310 US 586.

²⁸⁰ Thomas K Ndhlovu, ‘The problem of constitutional interpretation in Zambia: A thing of the past?’, (2002) vol 34 Zambia Law Journal, (now referred to as “Ndhlovu”), referring to S Mubako, ‘Fundamental rights and judicial review: the Zambian experience’, 1 Zimbabwe Law Review at 125.

²⁸¹ Ndhlovu at p 9.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ *The People v Silva and Freitas* (1969) ZR 121.

²⁸⁶ Ndhlovu at p 10.

²⁸⁷ Ibid.

judicial staff and broke windows.²⁸⁸ The Chief Justice and a few expatriate judges, including Judge Evans, resigned. In subsequent cases the judiciary was more conservative in its interpretation of the law when it involved the violation of a right by the state²⁸⁹

4.4.2 The Second Republic 1972 -1991

The one-party state commenced on 13th December 1972.²⁹⁰ During this period civil liberties were stifled.²⁹¹ Preventive detentions were common and subsequently so were applications for *habeas corpus*.²⁹² Few such applications succeeded and those that did displeased the executive.²⁹³ As earlier noted, it is surprising that during this era in which the socialist ideology of Humanism was in place the government failed to implement justiciable socio-economic rights. However this was probably as a result of a fear by the executive that such rights would curtail its powers.

4.4.3 The Third Republic 1991-

Multi-party democracy returned to Zambia on 31st October 1991 and shortly afterwards the state of emergency was lifted. This brought a sense of optimism to the judiciary about their treatment by the executive.²⁹⁴ In *Mulundika and Others v The People*²⁹⁵ the applicants, members of the opposition UNIP party, held a public meeting without obtaining a permit as required by section 5(4) of the Public Order Act. They were subsequently arrested by the police on that account. In the Magistrate's Court the accused's Counsel raised a preliminary issue challenging the constitutionality of the Public Order Act. The issue was referred to the High Court

²⁸⁸ Ibid.

²⁸⁹ See *Patel v Attorney General* (1968) ZR 128 and *Nkumbula v Attorney General* (1972) ZR 204 (C.A).

²⁹⁰ Ndholvu at p 10.

²⁹¹ Ibid.

²⁹² Ibid

²⁹³ Ibid. In the case of *Eleftheriaddis v Attorney General* (1975) ZR 69, the applicant applied for *habeas corpus* following detention on what he believed to be an offence that was unsustainable in law. The then Chief Justice Doyle granted the application. A week or two later the Chief Justice travelled to Germany to attend a Chief justices Conference. Upon his return he found that he had been replaced and was later appointed Director of the Law Development Commission. Again a few expatriate judges resigned in protest.

²⁹⁴ Ibid.

²⁹⁵ (1995-1997) Z.L.R 20 (SC).

where the Act was upheld. On appeal the Supreme Court found that section 5(4) of the Act contravened Articles 20²⁹⁶ and 21²⁹⁷ of the Constitution. The decision was widely applauded by civil society. However, the Vice-President made remarks questioning the impartiality of the court.²⁹⁸

Judge T.K. Ndhlovu comments that although more subtle than was previously the case, the independence of the judiciary is still interfered with by the executive.²⁹⁹ He however raises optimism that the *Mulundika* case³⁰⁰ is a turning point in the way judges decide cases without giving too much deference to the state.³⁰¹ In recent times the case of *Clarke v Attorney-General*³⁰² is another example of the judiciary taking a progressive approach. One hopes this will continue. If justiciable socio-economic rights are implemented the judiciary and the executive will have to cross paths many times. If people's rights are to be fulfilled the judiciary must be independent and progressive. The next section will look at the tools the judiciary has had at its disposal to give effect to socio-economic rights.

4.4.4 Tools the Judiciary has to give effect to socio-economic rights

Having established that the trepidation on the part of the judiciary in deciding cases against the state must be overcome, it is necessary to consider what tools the judiciary has at its disposal to enforce socio-economic rights and why they have not been used to advance socio-economic rights.

(a) International Law

As earlier mentioned, the Constitution is silent on the question as to whether international law can be used to interpret domestic provisions. In the absence of

²⁹⁶ Protection of freedom of expression.

²⁹⁷ Protection of freedom of assembly and association.

²⁹⁸ Ndhlovu at p 13.

²⁹⁹ Ibid.

³⁰⁰ Supra n. 295.

³⁰¹ Ibid.

³⁰² *Clarke v Attorney-General* Case No. 2004/HP/003, unreported. The applicant, a Zambian resident, applied for judicial review of a decision by the Minister of Home Affairs to deport him (without being heard) following a satirical article he had written in a newspaper that was offensive to the President and the Attorney-General and Minister of Legal Affairs. He applied for an order quashing the decision and an order mandamus to urge the Minister of Home Affairs to reconsider his decision on the ground that his right to freedom of expression had been violated and that he was being discriminated on the basis of his origins. The application was granted however the government has appealed the decision. The Supreme Court appeal is still pending.

specific provisions prohibiting it, international law has been used as a tool of interpretation in Zambia but only in cases involving civil and political rights. In *Clarke v Attorney General* and the case of *Longwe v Intercontinental Hotel Corporation*³⁰³ the Court made specific reference to international law as a tool of interpretation. The Zambian Supreme Court has stated the following in regard to the use of international law in domestic courts:

What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in the various jurisdictions can have or have had [a] uniform approach ... we are at different stages of development and democratisation and the courts in each country must surely have regard to the social values applicable to their own milieu.³⁰⁴

From this quotation it may seem as though the Zambian courts disregard international law in favour of local values. However, in the above-mentioned cases the courts have used international law in favour of protecting the domestic civil and political rights in question. In the absence of socio-economic rights in the Bill of Rights the Zambian courts could have used international law to protect socio-economic rights but to date they have not. It appears that the courts are only willing to use international law to interpret the civil and political rights contained in the Bill of Rights. This is probably because civil and political rights are considered to be legitimate rights because they are contained in the Bill of Rights and the socio-economic rights that are not contained in the Bill of Rights are not. Enshrining socio-economic rights in the Bill of Rights would make enforcing them legitimate in the eyes of the courts.

(b) Civil and Political Rights

In the absence socio-economic rights in the Bill of rights, civil and political rights are the most obvious tool for giving protection to socio-economic rights. The Constitution has the same fundamental civil and political rights that in India have been read to give effect to socio-economic rights such as the right to life and yet to date no civil and

³⁰³ Case No. 1992/HP/765, unreported. In that the applicant sued the hotel on the ground that their policy to prohibit unaccompanied women from patronising the hotel. She claimed that she was being discriminated on the grounds of her sex. The court upheld her claim.

³⁰⁴ *Fred Mmembe, Bright Mwape v The People and Fred Mmembe Masautso Phiri, Goliath Mungonge v The People* (1995-1997) Z.L.R 118 (SC) citing *Sata v The Post Newspapers Ltd and Another* 1992/HP/1395 and 1993/HP/821 unreported.

political rights have been read to give effect to socio-economic rights. This again is probably due to the fact that the courts do not want to be seen to be introducing “illegitimate” rights through the back door.

The fact that the Judiciary has tools at its disposal to give effect to socio-economic rights that are not being used shows that they are unwilling to give protection to rights that are not contained in the Bill of Rights. It is therefore imperative that socio-economic rights be enshrined in the Bill of Rights so that they too can be adequately and legitimately protected by the courts.

4.5 THE INADEQUACY OF THE HUMAN RIGHTS COMMISSION IN PROTECTING SOCIO-ECONOMIC RIGHTS

Zambia has its own Human Rights Commission established by the 1996 Constitution³⁰⁵ whose powers are contained in the Human Rights Commission Act.³⁰⁶ Its functions are to investigate human rights abuses and to educate the public on human rights.³⁰⁷ It has the power to investigate abuses, summon witnesses and request the production of any document or record.³⁰⁸ Under section 13(2) it can make recommendations to the relevant authority which shall recommend any action to be taken within thirty days.³⁰⁹ Anyone who contravenes section 13(2) will be guilty of an offence and liable on conviction to a fine of up to ten thousand penalty units or to imprisonment for a term not exceeding three years, or both.³¹⁰ The Human Rights Commission Act provides a wider standing than the courts. It includes representatives and interest groups as well as aggrieved individuals.³¹¹ Unfortunately, the mandate of the Commission does not extend to socio-economic rights³¹² so these remain unprotected. If socio-economic rights were enshrined in the Bill of Rights the Human Rights Commission could play a complementary role to the courts in protecting socio-economic rights. However, the Human Rights Commission is widely perceived as

³⁰⁵ Articles 125-126 of the Constitution of Zambia Chapter 1 of the Laws of Zambia.

³⁰⁶ Act No 39 of 1996.

³⁰⁷ Op cit Section 9.

³⁰⁸ Op cit section 10.

³⁰⁹ Op cit section 13(2).

³¹⁰ Op cit section 13(3).

³¹¹ Op cit section 10(1).

³¹² Section 111 of the Constitution of Zambia provides that “[t]he directive principles of state policy ...shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity”.

having no teeth, it cannot prosecute human rights violations nor does it have any coercive powers.³¹³ The Mung'omba Commission has made recommendations that this should be redressed.

PART II

Chapter 2 raised several conceptual arguments against the implementation of justiciable socio-economic rights. This part of the chapter will look at some of those conceptual issues with regard to how socio-economic rights can be implemented in Zambia.

4.6 THE AFFORDABILITY OF SOCIO-ECONOMIC RIGHTS IN ZAMBIA

It is a commonly held belief that poor countries like Zambia cannot afford to enforce justiciable socio-economic rights because of a lack of resources. Some critics contend that only civil and political rights belong in the Bill of Rights because they do not involve any positive obligations on the state and are subsequently more affordable. However, as has previously been argued, all rights possess positive and negative dimensions. There have been cases in Zambia involving civil and political rights where a positive right has been read into a negative right. For example, in the case of *Nyirongo v Attorney General*,³¹⁴ it was held that pursuant to Article 22, on the freedom of movement, a citizen has the right to travel and subsequently has the right to be issued with a passport. That involved a cost to the state. However, it is generally recognised that implementing socio-economic rights has more resource implications for the state than implementing civil and political rights does, hence the concept of progressive realisation. How can Zambia afford socio-economic rights? The Committee on Economic Social and Cultural Rights has recommended that countries adopt the minimum core standard in enforcing socio-economic rights. This involves providing the minimum essential requirements for each right. This would probably prove to be too expensive for a country like Zambia that has millions of poor people and very little resources. However, the Committee on Economic, Social and Cultural Rights has stated that where a country is unable to meet the minimum core standard it

³¹³ Mung'omba Report at p 221.

³¹⁴ (1990-1992) Z.R. 82 (S.C).

must prove that it has tried its best to meet its minimum obligations.³¹⁵ In other words the country need only provide what it can afford to. The reasonableness test developed by the South African court also caters for countries that are unable to meet the minimum core standard. Under the reasonableness test a country must do what it can to provide for the needs of the most desperate in society. Both approaches require the state to prioritise its resources and use them optimally. There is no reason why Zambia, or indeed any state, should fail to do this.

There is a general trend to implement justiciable socio-economic rights both in international instruments and in the domestic constitutions³¹⁶ of countries with comparable economic situations to Zambia. After socio-economic rights were incorporated into the African Charter on Human and Peoples' Rights ("ACHPR") adopted in 1986 several African countries included socio-economic rights in their Bill of Rights in the 1990's. Some of them adopted all the socio-economic rights in the Bill of Rights³¹⁷, including the new right to development introduced by the ACHPR. Others only introduced some of the rights into the Bill of Rights leaving the others unprotected.³¹⁸ The optional Protocol to the Covenant on the Elimination of Discrimination of All Forms of Discrimination against Women was adopted on 6th October 1999.³¹⁹ It allows individuals and groups to make complaints about the violation of their rights under the Covenant, including their socio-economic rights.³²⁰ The Committee can also make an inquiry into the violations of women's rights in a particular country. There are moves being made towards the adoption of an optional protocol to the ICESCR which will include an individual complaints mechanism.³²¹ There is an international recognition of the fact that socio-economic rights must be made justiciable in order for violations of these rights to be adequately remedied in the same way that civil and political rights are. This finally enforces declarations that

³¹⁵ General Comment 3 at para 10.

³¹⁶ See chapter 3.

³¹⁷ See Chapter 3 para 3.3.

³¹⁸ See Chapter 3 para 3.6.

³¹⁹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (A/RES/54/4) at www.unhchr.ch/html/menu3/b/opt_cedaw.htm [accessed 9/04/07].

³²⁰ Article 1 and 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

³²¹ See Centre for Economic and Social Rights 'Optional protocol to the International Covenant on Economic, Social & Cultural Rights' at <http://cescr.org/optionalprotocol?PHPSESSID=91...a78f9969da61bd9> (now referred to as "CESR") [accessed on 9/04/07].

the two sets of rights are interdependent and indivisible.³²² As indicated above, enforcing these rights does not oblige countries to spend beyond their means. Countries like South Africa have shown that people can claim socio-economic rights from domestic courts without crippling the economy of the country. Zambians too can afford to have their day in court.

4.7 THE COMPETENCE OF THE JUDICIARY TO ADJUDICATE OVER POLICY ISSUES

The Zambian judiciary has been adjudicating over administrative breaches of civil and political rights through the mechanism of judicial review since independence. As the case of *Nyirongo v. The Attorney General*³²³ shows this can involve placing positive obligations on the state. It is therefore very possible for the judiciary to review the constitutionality of policies, administrative decisions and legislation regarding socio-economic rights under Article 28 of the Constitution, where a petitioner can seek redress for a violation of any provision of the Bill of Rights. Regarding the issue of the judiciary's adjudication of socio-economic rights infringing on the principle of separation of powers, the principle of separation of powers in Zambia is a flexible one. For example, Parliament may delegate some of its legislative powers to make statutory instruments to certain authorities. The role of the judiciary is to uphold the law and protect the Constitution. Subsequently the state does not have absolute power to make arbitrary administrative decisions. As Anyangwe states:

The principle of constitutional supremacy presupposes judicial control of the constitutionality of laws; a peace-maker in matters of constitutional checks ... the principle by necessary implication enjoins the courts to ensure that all other laws are in conformity with the Constitution.³²⁴

As argued earlier³²⁵ judicial review does not necessarily involve policy-making but merely the sanctioning of policies, administrative decisions and legislation that violate laws in general and the Constitution specifically. In this way the judiciary will not

³²² Ibid.

³²³ Supra n.314.

³²⁴ Anyangwe at p. 22.

³²⁵ Chapter 2 para. 2.2.5.

infringe on the principle of separation of powers and will in fact be adhering to its mandate. The author agrees with the Mwanakatwe and Mung'omba Commissions' recommendations that a separate Constitutional Court is needed to deal with constitutional issues. This will ensure that litigants get justice quickly and that the other courts will not get congested with such matters.

4.8 ACCESS TO THE COURTS

Currently there is limited access to the Zambian courts. The Supreme Court in the case of *Nkumbula v The Attorney General*³²⁶ held that for an individual to have *locus standi* "there must be an actual or threatened action in relation to him".³²⁷ This rules out court applications by interest groups acting on behalf of affected persons. This may affect the access of indigent litigants to the Zambian courts. However, the Supreme Court is not bound by its previous decisions and it may decide to extend the *locus standi* to accommodate interest groups. As earlier mentioned increasing the capacity of legal aid would also improve access to the courts.

PART III

After having considered the fact that there is no system for protecting socio-economic rights, and having considered some of the conceptual reasons why it can work, this section now looks at the important role justiciable socio-economic rights can play in reducing the scourge poverty in Zambia.

4.9 POVERTY AND THE ROLE OF SOCIO-ECONOMIC RIGHTS

The Committee on Economic, Social and Cultural Rights has defined poverty as:

a human condition characterised by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.³²⁸

³²⁶ (1972) ZR 204 (C.A.).

³²⁷ Ibid.

³²⁸ 'Poverty and the International Covenant on Economic, Social and Cultural Rights': 10/05/2001. E/C.12/2001/10. Statement adopted by the Committee on Economic Social and Cultural Rights on 4th May 2001 (now referred to as "Poverty and the ICESCR") at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.2001.10.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.2001.10.En?Opendocument) [accessed 8/04/07].

This definition implies that poverty is not just a lack of economic or material resources but constitutes a violation of human rights, including socio-economic rights.³²⁹ Without socio-economic rights in the Bill of Rights the poor cannot claim the violation of their rights.

Poverty has many manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterised by a lack of participation in decision making and in civil, social and cultural life.³³⁰

In a democracy where 68% of the population are living in poverty this is very worrying indeed. According to Marshall, citizenship is "...a *status* bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed".³³¹ Because people are unable to participate effectively in the democracy they are also unable to change their circumstances, they become second or third class citizens. This should not be tolerated in a democratic society such as Zambia where all people are meant to be equal. According to the Committee on Economic, Social and Cultural Rights "[a]nti-poverty policies are more likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty if they are based upon international human rights".³³² The Office of the United Nations High Commissioner for Human Rights has developed a set of guidelines for the integration of human rights into poverty reduction strategies.³³³ Section 1 of the guidelines states the principles of the human rights approach that should be applied in creating poverty reduction strategies. Section 2 identifies the strategy for realising the rights relevant to poverty reduction which include the right to adequate food and the right to health, education, decent work and

³²⁹ JC Mubangizi, 'Know your rights: exploring the connections between human rights and poverty reduction with specific reference to South Africa', (2005) 21 *SAJHR* p. 32 (now referred to as "Know your rights") at p. 34.

³³⁰ 'The Programme of Action of the World Summit for Social Development' (1995) cited by Danwood Mzikenge Chirwa and Sibonile Khoza in 'Towards enhanced citizenship and poverty eradication: a critique of *Grootboom* from a gender perspective', in Amanda Gouws ed. (*Un)thinking Citizenship. Feminist Debates in Contemporary South Africa*, (2005) Ashgate (now referred to as "Chirwa and Khoza" at p 139.

³³¹ Cited in Chirwa and Khoza at p 139.

³³² Poverty and the ICESCR.

³³³ See 'Draft guidelines: a human rights approach to poverty reduction strategies' at <http://www.unhchr/development/povertyfinal.html#guid9> [accessed on 8/04/07].

adequate housing. Section 3 describes the way that the human rights approach can be used to direct the monitoring and accountability of the process. In making the Guidelines the following were taken into account:

- Rights and obligations demand accountability.
- The twin principles of equality and non-discrimination are among the most fundamental elements of international human rights law.
- A human rights approach to poverty reduction requires active and informed participation by the poor in the formulation, implementation and monitoring of poverty reduction strategies.
- The interdependence of human rights – the fact that the enjoyment of some rights may be dependent on or contribute to the enjoyment of others – should be recognised.
- Responsibility for poverty reduction is a universal obligation.
- Resource constraints ought to be recognised and an allowance made for progressive realisation of rights over a period of time and for the setting of priorities in the course of progressive realisation.³³⁴

If Zambia did use these guidelines in formulating the Poverty Reduction Strategy Paper it did not apply them very well. There is no systematic application of human rights in poverty reduction strategies because there is no obligation upon government to do so. As shown, poverty and socio-economic rights are interrelated and interdependent.³³⁵ For the millions that languish in poverty, enshrining socio-economic rights in the Bill of Rights provides the hope that the state will be forced to consider these rights in creating legislation and implementing policies, particularly those related to poverty reduction. As the Guidelines state “rights and obligations demand accountability”.³³⁶

4.10 CONCLUSION

It would appear that the executive is mainly to blame for the fact that socio-economic rights are not being adequately protected in Zambia. In its desire to satisfy the international monetary institutions the government has caused potentially poverty alleviating policies to suffer. Despite the country upholding the principle of separation of powers the fact that the executive has a stronghold in parliament and does

³³⁴ Know your rights at p. 38.

³³⁵ Chirwa and Khoza at p. 139.

³³⁶ Supra n. 333.

intimidate the judiciary means that it is difficult to hold the executive accountable for deficiencies in its policies. As Anyangwe says:

With such enormous powers, checked only by the process of judicial review timidly undertaken by a timid judiciary, by the rare political control device of impeachment and by uncertain adherence to the democratic value of periodical free and fair elections, it comes as no surprise that some presidents see themselves as the source of all authority in the state and as standing above the constitution which, in any event, they regard as their personal product to be used only when it suits them to do so.³³⁷

So what difference would the introduction of socio-economic rights in the Bill of Rights make? It must not be forgotten that in Zambia the Constitution is supreme law. That means that even the President is subject to the Constitution.³³⁸ If socio-economic rights were enshrined in the Constitution the people of Zambia would then own those rights and subsequently be able to lay claim to them forcing the government to apply them in administration, legislation and adjudication. Placing the rights in the Bill of Rights would give them an added protection because in order to amend the Bill of Rights the government must hold a national referendum³³⁹. Other methods of protecting socio-economic rights do not offer the same guarantees. As for the judiciary one can only hope that the *Mulundika* and *Roy Clarke* cases are a step in the right direction. Without their active participation socio-economic rights will be but a pipe dream. This chapter has shown that the conceptual hurdles to implementing socio-economic rights in Zambia can be overcome particularly as regards the affordability of these rights, judicial competence and access to the courts. The study has also shown that there is a link between poverty and human rights and that a holistic human rights based approach should be used in policies for the reduction of poverty. The need for justiciable socio-economic rights is clearly demonstrable. The people of Zambia must be able to seek justice for the deprivation of all their rights.

³³⁷ Anyangwe at p 19.

³³⁸ Ibid.

³³⁹ Article 79 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

A failure to entrench social rights is an act of institutional normatization that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognise the realities of life for certain members of society who cannot see themselves in the constitutional mirror. Instead they will see the constitutional construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted.³⁴⁰

The majority of Zambians are impoverished and are subsequently marginalised in society. They are unable to enjoy the right to a decent standard of living and do not have access to adequate food, nutrition, shelter, education and other basic necessities of life. The state is responsible for providing amenities and services and if it does not citizens should have the right to claim them through the courts. Historically, the Zambian Constitution has not afforded socio-economic rights the status of fundamental rights in the Bill of Rights. Constitutional legitimacy is something that Zambians are striving for. The Mung'omba Commission recorded significant calls for socio-economic rights to be given the weight of the law. If the Constitution is amended, this time around the people of Zambia must have the final say as to what goes into the Constitution. The Mung'omba Commission noted that there has been a trend in the African region towards making these rights justiciable by including them in the Bill of Rights. It also noted that resource constraints should not prevent these rights from being implemented as the government can be made to deliver optimal services to the people within its available resources.

The Mung'omba Commission's call for justiciable socio-economic rights is conceptually justifiable. Chapter two considered the arguments usually advanced against making these rights justiciable. All of them centre on the nature of the rights and the fact that enforcement by the judiciary would infringe on the principle of separation of powers, which is entrenched in the Zambian Constitution. All these arguments have been rebuffed using jurisprudence from around the world leading to

³⁴⁰ Scott and Macklem at p35-36.

the conclusion that there is no justifiable reason for not making these rights justiciable.

The various ways in which socio-economic rights are protected in various domestic legal settings have been considered. These include directive principles of state policy, civil and political rights, national legislation, and national institutions. However, as this thesis has argued, the Bill of Rights approach is the best approach to protecting socio-economic rights in a manner that is legitimate and provides some certainty for applicants. If Zambia does not amend its Constitution the alternative method of protecting these rights would be to use the Indian approach. However, given the history of the relationship between the judiciary and the executive, this approach is unlikely to be very successful particularly if the executive perceives the approach to be illegitimate in the sense that the judiciary would be creating justiciable rights that have not been provided for in the Constitution.

Chapter four of this paper has demonstrated why Zambia needs to enshrine justiciable socio-economic rights in its Bill of Rights. In other words, why the current system does not adequately protect these rights and why the Bill of Rights approach would be more appropriate. The thesis has shown that the executive's submission to the requirements of international financial institutions has affected its protection of socio-economic rights. Although the legislature has promulgated some laws concerning socio-economic rights it has not provided for the full spectrum of rights. The fact that the executive virtually controls the legislature means that the checks and balances on the executive are somewhat restricted. Zambia has had socio-economic rights in its Constitution as directive principles of state policy for the last ten years and there is no jurisprudence to show for it despite the overwhelming deprivation in the country. The history of cases in which the judiciary confronts the executive shows how the concept of judicial independence has been infringed to some extent by political interference causing judicial conservatism. The judiciary is the one organ that is designed to protect the sanctity of the Constitution and it is troubling to think that the judiciary can be intimidated into making decisions that support the executive. However the cases of *Mulundika and Others v The People* and *Clarke v The Attorney -General* show that there is a way forward and that the judiciary is prepared to stand up to the executive and uphold and protect constitutional rights. It has been argued that socio-

economic rights are needed in the Bill of Rights because the Constitution is the supreme law of the land - it is above even the executive. Placing these rights in the Bill of Rights is the ultimate protection. Amending the Bill of Rights would require a referendum so that the people have the final say. With the judiciary feeling bolder about confronting violations of the Constitution by the State the Zambian people would at last be able to hold the State accountable for deficient policies and service delivery without waiting for the next election. Given greater powers, the Human Rights Commission can play an effective complimentary role in protecting socio-economic rights. However, the Zambian people must have the ultimate right to seek redress from the courts. The thesis has demonstrated that the conceptual issues surrounding the implementation of socio-economic rights in Zambia are surmountable in relation to affordability of the rights, judicial competence and access to courts. The study has also shown that there is a connection between poverty and a lack of socio-economic rights. Given the extent of poverty in Zambia implementing socio-economic rights in addition to civil and political rights in poverty reduction strategies would go a long way to alleviating poverty.

This author recognises that most socio-economic rights must be achieved progressively within the available resources of the state. Zambia is one of the poorest nations in the world and there is no denying the fact that the Zambian government is severely resource-constrained. This, however, does not mean that Zambians cannot afford socio-economic rights. The implementation of socio-economic rights forces government to optimise its resources and be held accountable for failing to do so. Courts must demand proof that the State is doing all it can to realise these rights. Socio-economic rights in the Bill of Rights must be made as accessible as possible so that the marginalised can reap the fruits of justice. Given that the executive has controlled the amendments to the last three constitutions, the best way to ensure that the people's petition to the Mung'omba Commissions for the inclusion of justiciable socio-economic rights is implemented is through the implementation of a new constitution through a constituent assembly. But ultimately, in order to make these rights work judicial activism and political will are needed to give effect to these rights. Without these two factors socio-economic rights will remain mere aspirations of the State.

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